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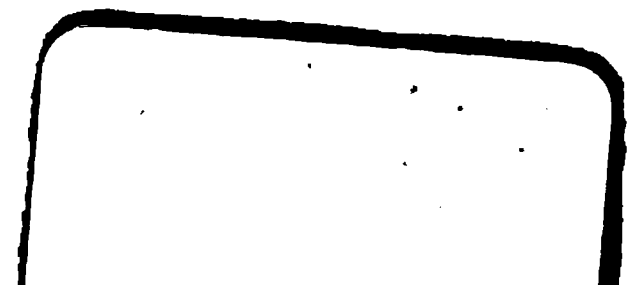
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THE

# SOUTHERN LAW REVIEW

—AND—

CHART OF THE SOUTHERN

LAW AND COLLECTION UNION

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JANUARY, 1872.

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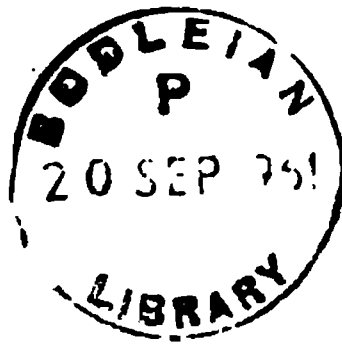
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# THE SOUTHERN LAW REVIEW.

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VOL. I.]

NASHVILLE, JANUARY, 1872.

[No. 1.]

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## *Powers of Municipal Corporations and their Officers.*

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THE powers of municipal corporations, and of their officers, have been the subjects of frequent discussion in the courts of the United States during the last few years. Until recently no distinction seems to have been made between such corporations and private corporations created for private gain. Reasoning from analogy the courts were inclined to hold that the same principles applied to both public and private corporations; that the powers conceded to the latter class belonged equally to the other as corporations; and that where the officers of private corporations could bind their corporations by their acts without express authority, or even against express authority, a like power must belong to the officers of public corporations. Gradually the courts have seen cause to doubt the correctness of the analogy, and have been widening the line of distinction between the two. It will be the object of this paper to pass in review the recent decisions, and to ascertain, if we can, whether any and what principles have been definitely settled by them upon the following points:—

1. Has a municipal corporation the power, without express legislative authority, to borrow money for any of the purposes of its incorporation?

2. Has it the power, without express legislative authority, to issue its paper clothed with all the attributes of negotiability?

3. Conceding the affirmative of these two queries, can the executive officers of a municipal corporation borrow money, or issue ne-

gotiable securities, for the corporation, so as to bind it, without "ordinance"; that is to say, without express authority from the legislative department of the corporate government in its collective official capacity?

The weight of authority seems to be in the affirmative of each of these propositions so far as private corporations are concerned. Such corporations may borrow money and issue negotiable securities for corporation purposes. And the officers of such corporations may, under circumstances, bind their principals without express authority, or even against positive instructions, *Farmer's Bank vs. Butcher's Bank*, 14 N. Y., 623; *Merchant's Bank vs. State Bank*, 10 Wall, 604.

The principle which underlies these decisions is, that private corporations, when once created, are like individuals, and may exercise the ordinary powers of individuals in carrying out the purposes of their organization, and will be bound by the acts of its officers as an individual would be by the acts of his agents. If the officer be held out to the world as clothed with certain general authority, any act of his within the scope of such general authority will be binding upon the corporation, although he may have positive instructions in the particular act to the contrary, for the public have no means of ascertaining the restrictions, and are not bound to take notice of the specific authority under which the officer should act. The proceedings of the Directors, or other governing body of private corporations, are not open to the public, nor are they ordinarily required to be made public. Persons who deal with such corporations have a right to presume that the officers are clothed with all the powers necessary to perfect the acts, and carry on the business usually transacted by them. The charters of such corporations do not usually prescribe the mode in which, as between the corporation and the public, the corporation shall do particular acts; nor do they make it the duty of the public, at their peril, to take notice of the directions of the governing body to its subordinates.

And herein lies the leading distinction between public and private corporations. The charters of municipal corporations usually provide that the powers conferred shall be exercised by ordinance, or enactment of the legislative department; and that these ordinances shall be published, or, at any rate, open to the inspection of the public. And without any positive provisions on the subject, it seems to follow from the very nature and object of such corporations, as arms of the government, that they should proceed in analogy to the

government itself, by the enactment of laws, and the publication thereof. Such ordinances legally passed and published have all the force and effect of statutes. “Enactments of this kind,” says Sedgwick, Stat. and Const. Law, p. 462, “within the sphere of their authority, have all the force of statutes.” Again, he says, p. 473, that a statute of a local or municipal character is as fatal to the validity of all contracts based on a violation of it, as if the act be one of a general character; *and a corporation ordinance is equally efficacious.*

It will be found, we think, that much of the apparent discrepancy in the authorities has been occasioned by not always bearing in mind this distinction. When the cases come to be accurately examined, and the points actually decided separated from the argument or dicta of the judges, it will also be found that there are very few not entirely reconcilable in principle, when read by the light thus set before us. The corporate powers of a municipal corporation can only be exercised by its legislative department, and the corporation can only be bound *ex contractu* by the act of that department. The officers of the municipality, unlike the officers of private corporations, are, like the officers of the general government or the officers of the State governments, merely ministerial to carry out the will of the legislature, and can not charge the corporation except by its express authority. And all persons who deal with the corporation, or its officers, are bound at their peril to know whether an act is authorized, for the proceedings are open to the public, and its ordinances have all the force and effect of statutes.

The argument in favor of the power of a municipal corporation to borrow money, and to issue negotiable securities, starts out with the general proposition of Ang. & A. on Corp., § 257, thus enunciated: “In general, an express authority is not indispensable to confer upon a corporation the right to borrow money, to deal in credit, or become drawer, endorser, or acceptor of a bill of exchange, or to become a party to any other negotiable paper. It is sufficient if it be implied as the usual and proper means to accomplish the purposes of the charter”—citing a number of authorities, only two of which are cases of municipal corporations: 7 Ohio, 31, and 4 Hill, 263. The learned author adds in the same section: “Where, however, the drawing, endorsing, or accepting such bills is obviously foreign to the purposes of the charter, or repugnant thereto, the act becomes a nullity and not binding on the corporation.” This qualification is very

material in view of the purposes of public municipal corporations, and the marked difference between the relation of the officers of such a corporation to their corporators, and the relation of the officers of private corporations to their corporators. The purpose of a municipal corporation is governmental. The purpose of a private corporation is individual gain. The corporators of a municipality elect their officers for a term of office to discharge functions of a public nature, and strictly analogous to those of the officers of government. The corporators of a private corporation elect officers to perform duties of an entirely different character, and analogous to those of the agents of an individual. It is difficult to conceive of a private incorporation for purposes of individual profit, where the borrowing of money and the execution of negotiable securities would be foreign to its purposes, or repugnant thereto. And it is equally difficult to conceive of a public corporation, created for governmental purposes, where the borrowing of money or the execution of negotiable securities is not foreign to its purposes or repugnant thereto. Ordinarily, the money raised by taxation, and orders upon the treasury, are the only modes of raising or paying money necessary or proper for such corporations. Express authority from the Legislature seems essential to authorize a resort to any other mode.

The general principle enunciated as above in a treatise professedly on private corporations, is borne out by the authorities so far as such corporations are concerned. The Supreme Court of Tennessee was one of the earliest of those Courts by whom this doctrine has been declared, and that, too, against a very strong argument by Chancellor Kent to the contrary: *Union Bank vs. Jacobs*, 6 Hum., 515. But it does not follow that this doctrine either has been, or ought to be, applied to municipal corporations. Private corporations are generally, and always where their powers have been construed liberally in regard to borrowing money or making negotiable securities, mere organizations for private emolument, to carry on a business by a combination of capital, and under special privileges which any individual would have the right to undertake. There is no particular reason why the corporate entity in such cases, should not be allowed to do all that the individual might do for like purposes. But it is altogether different with municipal corporations. They are created for public purposes which no individual could do, or could be authorized by law to do. They are arms of the State government, branches of the State sovereignty, created for governmental purposes.

Its officers are, like the officers of the State government, clothed with only such power as the organic law, (the charter,) or the law of the corporate legislature (the Board of Aldermen or City Council) may confer upon them. They can do nothing without positive law from the one source or the other. Their acts are otherwise *ultra vires* and void. All the authorities recognize these distinctions.

Let us now see what are the general principles recognized by the authorities, and which may be considered as settled in regard to the general powers of municipal bodies, and the mode of exercising them. "Powers of municipal corporations are express or implied. Implied powers are such as are necessary in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant": Cooley on Const. Lim., 194. All powers not expressly granted, or necessary to carry out those powers, are denied: *Cook & Steadman vs. Sumner Man. Co.*, 1 Sneed, 698; *Nichol vs. Nashville*, 9 H., 263; 4 Cold., 406; 1 Kans., 432; 8 Ind., 34; 1 Clark Ch., 223; 30 Ala., N. S., 461; 14 Me., 375; 32 Conn., 118, 131; 22 Conn., 552; 51 Me., 174, 608; 53 Me., 446; 45 N. H., 7; 13 Ohio St., 311.

A town, in the New England sense, in its corporate capacity, will not be bound even by the express vote of the majority, to the performance of contracts, or other legal duties not coming within the scope of the object and purposes for which it was incorporated: 13 Mass., 272; 16 Ind., 48; 11 Pick., 396; 1 Met., 284; 6 Allen, 152; 12 Cush., 103; 22 Conn., 552.

"The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the State in local government. The State can create them for no other purpose, and it can confer powers of government to no other end, without coming in conflict with the Constitutional maxim that legislative powers can not be delegated": Cooley on Const. Limitations, 211.

Nor can the Legislature clothe a municipal corporation in the State of Tennessee, with any power which is not a corporate purpose: 1 Sn., 698, *ut supra*, with the comment of Caruthers, J., page 663.

The rule is general, and applicable to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. If not done in the manner prescribed, the act is a mere nullity: *Zottman vs. San Francisco*, 20 Cal., 96;

*McSpeden vs. Mayor of New York*, 7 Bosw., 601; 20 How. Pr., 395; Abb. Corp. Dig., 869; *City of Leavenworth vs. Rankin*, 2 Kans., 357, 371; 16 Ind., 227; 7 Gray, 12; Abb. Corp. Dig., 522; Cooley on Const. Lim., 196.

A municipal corporation can not delegate the powers, which must be exercised by its legislative branch, to any of its officers or agents: *Whyte vs. Nashville*, 2 Swan, 364; *Oakland vs. Carpenter*, 13 Cal., 540; *Smith vs. Morse*, 2 Cal., 524; Cooley on Const. Lim., 204; Sedgwick Stat. L., 164.

The power of *expending money* for public purposes in municipal corporations is lodged with the *legislative*, and not the executive authorities, and must be exercised by *or in virtue legally enacted*: *City of Philadelphia vs. Flanigen*, 47 Penn. St. Rep., 21. "The power to contract is essentially a power to disburse. A valid contract is uncontrollable, demanding its performance at the hands of the judiciary, and calling to their aid the whole power of the government. It is manifest, therefore, that an independent, uncontrolled power to contract resting in the several departments, or chief officers of the city, would, in effect, take the control of their own finances out of the hands of the people themselves, and lodge it where it would be liable to the most pernicious abuses by extravagance, favoritism, and illegal expenditure": 47 Penn. St., 23; and see *Peterson vs. Mayor &c., of New York*, 17 New York, 454; *Johnson vs. City of Philadelphia*, 47 Penn., 382.

"Municipal corporations can exercise only conferred powers, and must exercise them according to prescribed rules. The charters of such corporations are public laws; their ordinances are published before taking effect; and all their business is conducted in the most public manner. All persons can inform themselves of their powers and the manner in which they are to be exercised; and if they propose to contract with them, are bound so to inform themselves at their peril": *City of Leavenworth vs. Rankin*, 2 Kans., 357, 371; and see *Mayor and C. C. of Baltimore vs. Eschbach*, 18 Md., 276; 47 Penn., 23, and 382 *ut supra*.

Where, therefore, a contract required by the municipal charter to be made by the Common Council, was made by a special committee of that body, it was held that not only was this contract invalid, but that it could not be validated by any subsequent action of the Common Council: 20 Cal., 96, *ut supra*; and see 2 Kan., 357. And so of a notice to the owner of a lot to build foot pavements, which the



charter provides shall be fixed by ordinance, the City Council can not delegate this power to some of its members: 2 Swan, 364.

And where a contract, under which work was done for a municipal corporation, is void because entered into in violation of the charter, the contractor cannot recover for the work in any form, neither under the contract, nor upon a *quantum meruit*: *Brady vs. Mayor, &c.*, 2 Bosw., 173, affirmed 20 N. Y., 317; 7 Abb. R., 234; 16 How. R., 432; Cooley on Const. Lim., 196. And if the officers of a municipal corporation assume to incur an obligation which it is not authorized to do, it is not made liable by the fact that it has received the consideration for the obligation: *Hodges vs. Buffalo*, 2 Denio, 110; 3 N. Y., 430; 2 Barb. 104; 17 N. Y., 449; 18 Cal., 590; Cooley on Const. Lim., 196. And the fact that money has been paid to a municipal corporation where it had no capacity or power to receive it, will not sustain an action, unless it has been appropriated by the corporation to municipal purposes by a valid ordinance: *Herzo vs. San Francisco*, 33 Cal., 134.

All these decisions are clearly founded on a proper consideration of the scope and object of municipal corporations, and the necessity of limiting the authority of their officers for the protection of the corporation. Nor have we found any cases directly in conflict, although there are general expressions of text writers and judges thrown out in considering the general powers of corporations, without being called upon specially to distinguish between public and private corporations which might run counter to some of them. Direct decisions are believed to be all one way, and to be fully sustained by principle.

Some of these cases do hold that a municipal corporation may contract a debt upon credit, and give its notes or obligations therefor, in the prosecution of its legitimate business, and for purposes authorized by the charter: 14 N. Y., 356; 39 N. Y., 523. In the first of these cases, *Ketchum vs. City of Buffalo*, 14 N. Y., the court expressly deny that the concession of such powers carries with it the right to borrow money. "It may be objected," they say, "that the reasoning here adopted tends to establish the right of a corporation to contract a debt for any authorized purpose by borrowing the money necessary to accomplish it; a right which, from the numerous legislative acts on the subject, it would seem corporations have not generally been supposed to possess. It is true, the power to contract to pay A \$10,000 at the end of a year for doing certain work, and the



power to borrow \$10,000 of B upon the credit of a year, for the purpose of paying A for doing the work, might seem, at first view, to be substantially identical. The amount is the same, and the time of payment the same; the creditor only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created can not be diverted to any illegitimate purpose. The contract not only creates the fund but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may be applied to the object for which it was avowedly obtained. It may be borrowed to build a market, and appropriated to build a theatre, and yet the corporation would be liable for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. If they may procure the requisite funds by the indirect method of borrowing, they may resort to any other indirect mode of obtaining them, such as establishing some profitable branch of trade, entering into commercial enterprises, &c., the avowed object being to obtain the means necessary to accomplish some authorized purpose. No one can fail to see, that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects." See to same effect *Curtiss vs. Leavitt*, 14 N. Y., 62, 267.

And this is unquestionably the better doctrine, and in accord with the practice of applying for and obtaining legislative sanction to the borrowing of money upon corporation bonds. But in *Mills vs. Gleason*, 11 Wis., 470, it was held that municipal corporations have implied authority to borrow money for corporation purposes.

There is more seeming conflict of the authorities on the power of a municipal corporation, without express legislative grant, to execute paper clothed with all the attributes of negotiability. But here again, we think, the conflict will be found, upon a careful examination of the decisions, to be more seeming than real. If there be an express grant of the powers, all the authorities, we believe, agree

that the paper will be negotiable in the full sense of the law merchant. And of this class are all the cases decided by the Supreme Court of the United States, and to which we will more particularly direct our attention presently. On the other hand, in the absence of such legislative authority, all the cases *in which the point has been directly made*, agree that the warrant, check or other instrument used for the purpose of paying money out of the treasury of the corporation, in the ordinary course of business, is not clothed with all the attributes of negotiability: *Clark vs. City of Des Moines*, 19 Iowa, 201, where the subject is fully discussed and numerous authorities cited. To those there cited may be added *Bayerque vs. San Francisco*, 1 McAll., 175; *Halsted vs. Mayor, &c., of N. Y.*, 5 Barb., 218; *Lucas Turner & Co., vs. San Francisco*, 7 Cal., 462.

Some of the cases hold that an instrument is not negotiable at all, and no action can be sustained upon it except by, or in the name of the original holder. And this is the decision in *Bayerque vs. San Francisco*, 1 McAll., 175, which was an action upon a warrant of the City of San Francisco brought in the Circuit Court of the United States for the District of California. And this is, undoubtedly, the general current of decision in regard to warrants of townships in the New England sense, counties, school districts, and the like municipal, or *quasi* municipal corporations: *Smith vs. Cheshire*, 13 Gray, 318; *Sturtevant vs. Liberty*, 46 Me., 318; *Andover vs. Grafton*, 7 N. H., 298; 26 Verm., 345; *People vs. El Dorado County*, 11 Cal., 170; *Rensselaer County vs. Weed*, 35 Barb., 136; 5 Denio, 117; *Dyer vs. Covington Township*, 19 Penn., 200; *School District vs. Thompson*, 5 Min., 280; *Bullock vs. Curry*, 1 Met., Ky., 171.

On the other hand, there are a few cases both of city and county warrants, where it has been held that such warrants, if in form negotiable, may be passed to third persons so as to authorize them to sue thereon in their own name. Thus, the case of *Kelly vs. Mayor of Brooklyn*, 4 Hill, 265, which is the leading case on this point, and is based entirely upon the analogy of the powers of a municipal corporation to those of a private corporation in the issuance of negotiable paper, was a suit by such a holder. The report expressly recites that: "It appeared (on the trial) that the instrument was drawn in the ordinary form and according to the usual course of business in such cases, *having been authorized by a vote of the Common Council.*" The decision is, therefore, simply that a municipal corporation may, *by express ordinance*, authorize the execution of a warrant upon its

treasury, or other instrument binding upon it, in a form that will enable a subsequent holder to sue upon it in his own name. And this is the full extent of the decisions in 6 McLean, 447; *Bull vs. Sims*, 23 N. Y., 570, and *Clark vs. Des Moines*, 19 Iowa, 209. But the courts of New York and Iowa, in which these two last decisions were made, have also repeatedly held, and the Iowa courts in the very case referred to, that municipal corporations have no power, *without express legislative authority*, to bind themselves by negotiable paper, with all the incidents of negotiability; and that such paper issued without such authority has no other binding effect in the hands of a *bona fide* indorsee for value before maturity, than it would have in the hands of the original holder: *Clark vs. Des Moines*, 19 Iowa, 209; *Halsted vs. Mayor of New York*, 5 Barb., 218; Aff. 3 Comst., 430; *Gould vs. Town of Sterling*, 23 N. Y., 459; and the case of *Treadwell vs. Commissioners*, 11 Ohio St., 183, is to the same effect.

The case of *Clark vs. City of Des Moines*, 19 Iowa, 209, is directly in point. The charter of the City of Des Moines provided that every warrant on the treasury should be signed by the Controller, and countersigned by the Mayor, and that no money should be drawn from the treasury unless appropriated by the City Council. The City offered to show that the warrants were issued without any authority from the City Council, and without any vote of the Council authorizing the same. It was held, upon an elaborate review of the authorities, and full consideration of the subject, that the evidence should have been admitted, and that it would constitute a complete defense.

"We have been able," say the Court by Dillon, J., "after a thorough investigation, to find no case which holds that city and county warrants, like those before us, are freed from equities in the hands of *bona fide* holders. Nor has the plaintiff's counsel called our attention to any such. On the other hand, we have found several cases in different States expressly holding that such orders were not commercial paper in the hands of an innocent holder, so as to exclude evidence of the legality of their issue, or preclude defenses thereto:" citing *Halstead vs. Mayor of New York*, (on audited city warrants,) 5 Barb., 218; affirmed in 3 Comst, 430, but without passing on rights of *bona fide* holder; *People vs. El Dorado County*, (on audited county warrants,) 11 Cal., 170; *S. P. Sturtevant vs. Liberty*, (town orders,) 46 Me., 318; 13 Gray, 318; 7 N. H., 298; 2 *Id.*, 251; 26 Verm., 345; 9 Ind., 224; 5 Minn., 280. And see language of Bennett, J., in *Turner, Lucas & Co. vs. City of San Francisco*, 7 Cal., 462, a case

almost identical in facts, with the addition that the charter of San Francisco expressly authorized the creation of debts to the amount of \$50,000 for any purpose allowed by the charter, and the borrowing of money on the credit of the city not to exceed that sum.

And this is the conclusion of Judge Cooley, in his able work on Constitutional Limitations, page 215 and notes, upon a careful review of the cases: "The first requisite," he says, "to the validity of such subscriptions (stock in railroads) or (issuance of negotiable) securities, would seem, then, to be a special legislative authority to make or issue them—an authority which does not reside in the general words in which the powers of local self-government are usually conferred, and which must be followed by the municipality in all essential particulars, or the subscription or security will be void. And while mere irregularities of action, not going to the essential of the power, would not prevent parties who had acted in reliance upon the securities enforcing them, yet, as the doings of these corporations are matters of public record, *and they have no general power to issue negotiable securities*, any one who becomes holder of such securities, *even though they be negotiable in form*, will take them with constructive notice of any want of power in the corporation to issue them, and can not enforce them when their issue was unauthorized."

The learned author, after citing the cases in notes, concludes that "it is impossible to reconcile the authorities upon the point whether, where a corporation has power to issue negotiable paper in some cases, and has assumed to do so in cases not within the charter, a *bona fide* holder would be chargeable with notice of a want of authority in the particular case, or, on the other hand, would be entitled to rely on the securities themselves as sufficient evidence that they were improperly issued, when nothing appeared on their face to apprise him of the contrary." He is, himself, of opinion that the doctrine in the case of *Gould vs. Town of Sterling*, 23 N. Y., 458, cited and relied on in *Clark vs. Des Moines*, *ut supra*, is sound, and that wherever a want of power exists, a purchaser of the securities is chargeable with notice of it, if the defect is disclosed by the corporate records, or, as in that case, by other records where the power is required to be shown.

The decisions which he cites as sustaining a doctrine in conflict with his own conclusions, are all cases of private corporations: 11 Paige, 635; 16 N. Y., 125; 24 Ind., 461; 6 El. & Bl., 327. But there are *dicta* of learned judges, which, considered abstractly from the facts of the particular case then before them, tend to extend the

doubt to cases of public corporations. Thus, the language of Swayne, J., in *Gelpecke vs. Dubuque*, 1 Wal., 203, is very broad, and was used in the case of a municipal corporation: "Where a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority; and they are no more liable to be impeached for any infirmity in the hands of such holders, than any other commercial paper." This language is justly liable to criticism, and has not passed without the comment of courts and text writers. See 11 Ohio St., 183, and *Cooley*. It is probable, as we shall see presently when the decisions of the Supreme Court of the United States are passed in review, that the language of the learned Judge has been misunderstood, and that he only means that a *bona fide* holder is not bound to inquire into the regularity of the circumstances under which the securities were issued.

The true distinction between an express or general power, which belongs to individuals and certain private corporations, and an implied or special power, is admirably put by Edwards, J., in *Halstead vs. Mayor, &c., of New York*, 5 Barb., 218: "Municipal corporations," he says, "have no general power, either express or implied, to issue negotiable paper. They have only a special or conditional implied power for that purpose; and it is necessary, as a condition precedent to the validity of such paper, that the debt which forms the consideration should be contracted in the proper legitimate business of the defendants. The act under which they are incorporated is declared to be a public act. Every person who takes their negotiable paper is bound to know the extent of their powers, and is presumed to receive it with full knowledge that they have only a limited and conditional power to issue it. *He is thus put on his inquiry, and takes it at his peril.* The circumstances under which a *bona fide* holder, without notice, receives the negotiable paper of a natural person, or of a corporation having the general or express power to issue negotiable paper, are very different. In both these instances, the power to issue such paper is general and unconditional; and hence the rules which have been established by commercial policy, for the purpose of giving currency to mercantile paper, are applicable."

Upon principle and correct analogy, it seems difficult to avoid the conclusion that a municipal corporation can neither borrow money nor issue negotiable paper, without express legislative authority; and

the weight of judicial decision is in favor of this result. In view of our American experience, that the financial management of such corporations is notoriously corrupt and corrupting, that these conclusions should be uniformly reached by the courts, is a consummation most devoutly to be wished. Neither New York, in the plenitude of the unrestricted power of its citizens, nor New Orleans, with its fettered people, has escaped the demoralization which the control of municipal finances seems to produce. The only safety of the innocent victims lies in the firm recognition by the courts of the doctrine that third persons who deal with such corporations, or take any of its paper, are "put on inquiry," and must act "at their peril."

If we concede, however, that a municipal corporation may borrow money, or issue negotiable securities, it remains to be considered whether these acts can be done by the executive officers of the corporation, so as to bind the corporation, without ordinance. That is to say, whether such officers can, under any circumstances, create a pecuniary liability by contract without express authority from the legislative department of the corporation. There are cases, as we have seen, where the officers of a private corporation, acting in their ordinary routine of duty, may bind their principal without express authority, or even against positive instructions. Is this true of the officers of municipal corporations?

The general rule in regard to all corporations is, that a corporation can not vary from the object of its creation, and that persons dealing with it must take notice of whatever is contained in the law of its organization: *Pearce v. Madison & Ind. R. R. Co.*, 21 How., 441; *Zabriskie v. Cleveland R. R. Co.*, 24 How., 398, and cases cited. In the first of these cases it was held that a railroad company could not buy a steamboat, and that notes given in consideration of such purchase were *ultra vires*, and void in the hands of a person having knowledge of the consideration. So, if the power to contract does not exist, it is clear that the protection extended to an innocent holder for value, and without notice, does not apply: *Marsh v. Fulton Co'ty*, 10 Wal., 676. And it was held in this case that where a county is authorized by statute to issue bonds for a particular purpose, and bonds are issued by the Board of Supervisors under the statute, the holder is "bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds." This is the law as respects commercial paper issued under any delegated authority. The holder must



see that the paper on which he relies comes within the powers under which the delegate acts. "And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued:" *The Floyd Acceptances*, 7 Wal., 676.

On the other hand, there is a class of cases where the power is given and exercised by the proper parties, but without seeing that all the pre-requisites to the exercise of the powers were rigidly complied with. In this class of cases the *bona fide* holder is protected.

The leading case is the *Commissioners of Knox County v. Aspinwall*, 21 How., 544. The Legislature of the State of Indiana had, by special Act, authorized the Commissioners of Knox county to issue the negotiable securities in question, upon a vote of the people of the county in favor of the purpose (the building of a railroad) for which the bonds were to be issued. The bonds came to the hands of a *bona fide* holder, and the objection made to them was, that the notices for the preliminary popular election prescribed by the statute had not been properly given. "This view," says Nelson, J., who delivers the opinion of the court, "would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to determine whether or not the election has been properly held?" And the Court being of opinion that the Legislature having given the Board the power to issue the bonds and to decide upon the fact whether the preliminary conditions were complied with, and the Board having actually decided that the conditions had been complied with, their decision was final after the bonds had been issued. The principal case cited and relied on by Judge Nelson, is that of the *Royal British Bank v. Tarquand*, 6 Ell. & Bl., 327, which was the case of a private company, but analogous to that then under consideration in its main feature; for there the Directors, who issued the bond in controversy, were authorized by the act of settlement to issue it upon a resolution of the shareholders, and had decided that the resolution had been made, and so it had, though informally. This point is more clearly brought out in the report of the case in banc, in 5 Ell. & Bl., 248. The suit was by Tarquand on a bond given by the Directors to secure an account then opened by Tarquand with the Bank. The plea in defense was, that the bond could only be executed by the Directors upon a resolution of the shareholders. The replication set out the resolution on which



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The cases of *Moran vs. County Commissioners*, 2 Bl., 723; *Mercer County vs. Hackett*, 1 Wall., 85; *Gelpecke vs. Dubuque*, 1 Wall., 175; *Van Hostrup vs. Madison City*, 1 Wall., 271; *Supervisors vs. Schenck*, 5 Wall., 783, and *Lee County vs. Rogers*, 7 Wall., 183, are identical in principle with the case of *Commissioners of Knox County vs. Aspinwall*, and decided accordingly.

In all these cases there was express legislative authority to issue the bonds in controversy, and they were issued by the body intrusted by the Legislature with the power, and the attempt was to go behind the Act, and to show that pre-requisites to its valid exercise had not been properly complied with. There had, in every instance, been a decision by the persons empowered by the Act of the Legislature to make it, that the pre-requisites had been complied with.

These decisions are entirely unexceptionable, are in accord with the decisions of other courts, and, among others, of the courts of Tennessee: *Adams vs. Memphis R. R. Co.*, 2 Cold., 645. They only go to the extent of holding that if the body which is entrusted by the Legislature with the power of issuing bonds, upon certain conditions, determine that these conditions have been complied with, and so announce to the world by doing the act, it is too late to question the regularity of the proceedings after the bonds have come into the hands of innocent third persons. The legal effect of these decisions

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a *bona fide* holder, that the signature is not genuine, or was made without authority. And even if the signature be genuine, the signer may show that it was written for another purpose, or under a misapprehension, fraudulently superinduced, of the character of the instrument: *Whitney vs. Snyder*, 2 Lansing, 497. So a corporation may dispute the authority of any person who may have used its name or corporate seal, no matter into whose hands the paper may have come: *Koehler vs. Black River Co.*, 2 Bl., 715; *City of Leavenworth vs. Rankin*, 2 Kan., 357–371; 2 Nev. & Man., 573; 5 B. & A., 866.

We are now prepared for the decisions, and we can not do better than to commence with the decision of the Supreme Court of the United States, in the case of the Floyd Acceptances, 7 Wal., 666. The question there, was as to the validity of the acceptances of bills of exchange by a high officer of the government—the Secretary of War—in the hands of an innocent holder. The Court say, p. 676: “An individual may, instead of signing with his own hands, the notes and bills which he issues, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept, in all cases, as fully as the principal could; or it may be a limited authority to draw or accept, under given circumstances defined in the instrument which confers the power. But, in each case, the person dealing with the agent knowing that he acts only by virtue of a delegated power, must, *at his peril*, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterward; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market, purporting to bind the government, it must necessarily be by the signature of an officer of the government; and the purchaser of such paper, *whether the first holder or another*, must, *at his peril*, see that the officer had authority to bind the government.”

The holders of the acceptances sought to sustain them by proof of usage in similar cases. To this the Court say: “As regards usage, it must occur at once, that if there are instances in which the use of bills of exchange by officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however com-

men, can not establish usage in cases not so authorized." And, as if the learned Judge was aware of the erroneous inference drawn from the language of Judge Swayne, before quoted, he adds: "It can not be maintained that, because an officer can lawfully issue bills of exchange for some purposes, no inquiry can be made in any case into the purpose for which such a bill was issued. \* \* \* Such a doctrine would enable a man in private life, to whom a well-defined and limited authority was given, to ruin the principal who had conferred it. So, it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit."

The foregoing doctrine, in its train of reasoning, places a public and private agent upon the same ground, and holds that neither can bind the principal by negotiable paper, unless authorized, and that all persons must, at their peril, see to the authority. Some of the State decisions draw a strong line of distinction between public and private agents.

"Though a private agent," says the Supreme Court of Maryland, "acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule, as to the effect of a like act of a public agent, such as the officer of a municipal corporation, is otherwise. The powers and duties of such officers are *specially defined and limited by ordinances having the character and force of public laws*, ignorance of which can be presumed in favor of no one dealing with him as to matters thus conditionally within his official discretion. A municipal corporation, therefore, can not be held liable for the unauthorized acts of its agents, though done *officii colore*, without some corporate act of ratification or adoption:" *Mayor of Baltimore vs. Eschback*, 18 Md., 276.

"The power of expending money," says the Supreme Court of Pennsylvania, 47 Penn., 23, "for public purposes in municipal corporations, is lodged with the legislative, and not the executive authorities, and must be exercised by ordinance legally enacted. \* \* \* An independent, uncontrolled power to contract, resting in the several departments or chief officers of the city, would, in effect, take the control of their own finances out of the hands of the people, and lodge it where it would be liable to the most pernicious abuses by extravagance, favoritism and illegal expenditure"

“Some acts of corporations,” says the Supreme Court of Kansas, “other than those created for governmental purposes, are to some extent, and for some purposes, estimated, measured, and construed by the same rules that apply to the acts of individuals; but municipal corporations can exercise only conferred powers, and must exercise these according to prescribed rules. \* \* \* The charters of such corporations are public laws; their ordinances are published before taking effect; and all their business is conducted in the most public manner. All persons can inform themselves of their powers and the manner in which they are to be exercised; and if they propose to contract with them, are bound to inform themselves at their peril. \* \* \* And the seal of a municipal corporation attached to a contract does not estop the corporation from enquiring into the power of its officers to make it”: *City of Leavenworth vs. Rankin*, 2 Kan., 357, 371.

The case of *Clark vs. City of Des Moines*, as we have already seen, is directly in point. There the offer was to show that the warrants in controversy were issued without any authority from the City Council. The court held the evidence to be admissible. “The plaintiff,” say the court, “in taking these warrants was bound at his peril to ascertain the nature and extent of the powers of these officers and of the city corporation”: citing 2 Hill, 159, 174; 26 Wend., 192; S. C., 8 Paige, 53; 2 Denio, 110; 17 N. Y., 242; 15 *Id.*, 341; 6 Allen, 187; 4 *Id.*, 57; 23 How., 381, 391.

“A warrant,” they add, “issued by the Mayor and Recorder without the previous order of the Council, is void. They have no authority to do it; it would be substantially a forgery. A purchaser of such a warrant is bound at his peril, at least to ascertain that the claim upon which it is founded has been liquidated and settled by the Council. A representation by municipal officers that this has been done, (and the issue of such a warrant is in substance such a representation,) will not be binding upon the corporation. Why? The answer is because an agent can neither create or enlarge his powers by his unauthorized representations. The law on this subject has, of late years, been much investigated, and will be found discussed and examined in a most critical and exhaustive manner in

following important cases”: citing *Mechanic's B nk vs. N. Y. & N. H. R. R. Co.*, (Schuyler-fraud case,) 13 N. Y., 599; *F rmer's Bank vs. Butcher's Bank*, (where teller contrary to instructions, certified a check to be good,) 14 N. Y., 623; S. C., 16 N. Y., 125;

*Clifflin vs. Farmers's and Citizen's Bank*, 25 N. Y., 293 ; *Gould vs. Sterling*, 23 N. Y., drawing distinctions between that and teller case 14 N. Y., 623 ; 25 N. Y., 595 ; 26 N. Y., 505.

"Now," continue the court in the *Des Moines* case, "without entering into these interesting discussions respecting the liability of principals in *certain cases* for the acts of agents *apparently*, but not *really*, within the scope of their commission, we need only observe that if it be conceded that the Mayor and Recorder had the apparent power to issue warrants like the ones in suit, still, if they did not really have this authority their representations that they possessed it, would not be representations of a fact, which from its nature, (as in the case of the teller who certified the check,) rested peculiarly within the knowledge of the agent. On the contrary, the charter and journals of the corporation open to public inspection, afforded to every person the certain means of ascertaining the existence of the authority of these officers to issue warrants."

"Any other doctrine, they conclude, nullifies the limits and checks contained in the charter for the protection of the corporation, and needlessly invests the public officers and agents with the power successfully to 'Schuylerize' our public corporations without limit and without remedy."

To the same effect is the language of Judge Cooley, *Const. Lim.*, 196: "Even if a party is induced to enter upon work for a corporation by the *false representations of corporation officers*, that certain preliminary action had been taken on which the power of the corporation to enter upon the work depended, these false representations can not have the effect to validate a contract otherwise void, and can afford no ground of action against the corporation ; but every party contracting with it must take notice of any want of authority which the public records would show": citing *Swift vs. Williamsburg*, 24 Barb., 427 ; *Goodrich vs. Detroit*, 12 Mich., 279.

"The true rule," says the Supreme Court of Ohio, in the case of *Treadwell vs. Commissioners*, 11 Ohio St., 183, is, that the want of corporate power, or the want of authority in the municipal officers, can not be supplied by their unauthorized acts or representations": citing *Gould vs. Town of Sterling*, and distinguishing the case of *Commissioners of Knox County vs. Aspinwall*, and the case in 6 Ell. and Bl., on which it rests, as cases of "irregularity in the proceedings of a company having power to do the act." "The distinction, say



the court, between such cases and those where an act is illegal, or there is a want of power, is manifest."

The only cases which seem to be in conflict with this long array of authorities, are the *San Francisco Gas Co. vs. City of San Francisco*, 9 Cal., 453; *De Voss vs. City of Richmond*, 18 Grattan, 338; and *Alleghany City vs. McClerkin*, 14 Penn. St., 82. In the first of these cases it was said: "A municipal corporation may incur liabilities otherwise than by ordinance. Under some circumstances it may become liable by implication. It can not avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. The implication of a promise existing in such case against individuals extends equally to corporations." But this case and the case of *Argenti vs. San Francisco*, 16 Cal., 255, based thereon, were expressly overruled in the subsequent case of *Zottman vs. San Francisco*, 20 Cal., 96, Cope, J., who delivered the opinion in *Argenti vs. San Francisco*, expressing himself as convinced of the error of the reasoning upon which his conclusions were arrived at. "The error," he says, "arose from paying too little attention to the restrictive provisions of the charter. \* \* The fact that the city has received a benefit, is not sufficient to create a liability on her part; for no responsibility can result as a matter of implication, where the law itself negatives the idea of its existence. It seems to be settled, that where a charter of incorporation prescribes the mode in which the contracts of the corporation are to be made, such mode must be strictly pursued or the corporation will not be bound. Individual members of a corporation have no authority to bind the corporate body, nor can a corporate engagement be implied from conduct or declarations unauthorized by the corporation or inconsistent with the charter. Corporations can not be bound except by corporate acts; and it is only by such acts, done either by the corporation as a body, or by its authorized agents, that any implication can be made, binding it in law; and no act contravening the provisions of the charter can be considered valid as a corporate act. There is no doubt of the application of this doctrine, and in the absence of a contract deriving its validity from the charter, the conclusion that the city is not liable seems to me irresistible. The rule that corporations must act in the prescribed mode applies with peculiar force to a corporation organized for a public purpose."

The case of *De Voss vs. City of Richmond*, was this: It was the

practice, upon every transfer of the bonds of the City of Richmond, to surrender the bond to a special officer appointed for the purpose, who issued a new bond in lieu of the one surrendered, and who kept a record of the transaction. During the late war, the Confederate court at Richmond undertook to confiscate a bond of the city then held by a citizen of Massachusetts, and ordered the city to issue another bond in the place of the one confiscated. The city obeyed the order of the court, but, by ordinance, directed that the fact should be expressed on the face of the new bond, which, however, was not done. The bond thus issued was afterwards transferred and surrendered by the transferee, and a new bond obtained, in which the recital that it was in lieu of a confiscated bond was also omitted. The suit against the city was upon this last bond, and the defense was that the purchaser, when he went to the proper officer to obtain the bond in lieu of the one bought, might have traced the bond back to the confiscation, and seen that it was void. The court conceded that any person dealing with a corporation in its public capacity was bound to take notice of its ordinances. But held that the city of Richmond, in the issuance and renewal of its bonds in the particular case, was not acting in its capacity as a public corporation, but was *quoad hoc* a private corporation. That the record kept by the officers of the surrender and re-issue of bonds was a private book, to which the public had no access, and that the purchaser was not required to take notice of its entries. The distinction thus taken between acts of a municipal corporation as a public corporation and certain other acts as to which it is to be considered only as a private corporation, was first broached in *Bailey vs. Mayor of New York*, 3 Hill, 531, and has been considered as sound in some subsequent cases in other States, for some purposes. But the distinction has been since commented on by the Court of Errors of New York, and held (except in a very qualified sense) not to be sound: *Darlington vs. Mayor, &c., of New York*, 31 New York, 198; *Roosevelt vs. Draper*, 23 N. Y., 325. Be this as it may, the case of *De Voss vs. Richmond*, being expressly based upon this distinction, it is clear that the decision is no authority where the acts, if acts of the corporation at all, are in its public capacity, and for public purposes.

The case of *Alleghany City vs. McClurkan & Co.*, 14 Penn. St., 81, was a suit brought upon notes issued by Alleghany City to circulate as money, under a general statute of the State of Pennsylvania, en-

acted in 1828. The defense was, that the statute only applied to individuals and not to municipal corporations. But the court held that the statute did extend to cities, and authorized them to issue change bills, and that the city was liable. But the court having thus in effect, decided the case, do add, that "it is not universally true that a corporation can not bind the corporators beyond what is expressly authorized in its charter. There is a power to contract undoubtedly; and if a series of contracts has been made openly and publicly within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted." This doctrine, if correct, would be based upon the principle of estoppel, like the cases of *Keithsburg vs. Frick*, 34 Ill., 421, and *State vs. Union Township*, 8 Ohio St., 401. It goes upon the ground that the corporation having done the acts, and having repeatedly recognized them, with full knowledge of the corporators and acquiescence on their part, the corporation is estopped. But such a doctrine can have no application to a case where the corporation undertakes to dispute not its own acts, but the acts of its officers.

And this leads us to the consideration of the ratification of the acts of its officers by the legislative department of a municipal corporation, and how far the knowledge of such acts by the members of that department can give them validity; and, also, what effect the receiving a benefit by the act has in validating it.

These points were fully considered by the Supreme Court of California in the case of *Zottman vs. City of San Francisco*, 20 Cal., 96. In that case, the Common Council had, by ordinance, authorized a contract for the erection of an iron fence around the public square in which the City Hall was situated, with a wooden basement underneath the fence. The committee entrusted with the supervision of the work changed the wooden basement into stone, and had the fence painted, no provision having been made for this purpose in the contract. The city was sued for this extra work, and the charge was sought to be sustained by proof that the work was done with the knowledge and approval of the members of the Common Council, and the city had the benefit of it. "The testimony, say the court, in their opinion, shows that during the progress of the work all the members of the Common Council must have been aware of the order to the contractors, (for the extra work,) as the work was in full view from the windows of the Council chamber, and *was the subject of general conversation, and approval by the members at their various*

sessions and elsewhere, and no opposition to it was ever expressed by any member."

Upon these facts the court say: "A municipal corporation derives all its powers from its charter, and where its charter prescribes the mode in which its contracts shall be made, no contract will bind the corporation unless made in that mode. As a necessary consequence, a contract not made in the prescribed mode can not be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened on the corporation." "Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode, supposes the power to contract in the same way." See *Marsh vs. Fulton County*, 10 Wal., 676, to the same effect.

"We had occasion in the case of *McCracken vs. City of San Francisco*, 16 Cal., 619, to give to this subject great consideration, and we there held that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode; and that a ratification can only be made when the principal possesses at the time the power to do the act ratified. The doctrines there laid down we regard of vital importance to the protection of the interests of municipal corporations. \* \* \* \* Since that decision was rendered, we have had our attention called to the case of *Brady vs. Mayor, &c., of New York*, 16 How. Pr., 432, where these doctrines are affirmed in an opinion of great force."

"Individual members of the Common Council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given, and like contracts made by any other resident of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct, impart validity to such contracts."

"Nor does the fact that the corporation has received the benefit of the work, render it liable upon a *quantum meruit*. The corporation can only act through its chosen officers and agents, (in the mode prescribed by the charter.) If they not only may pay for work and labor actually done without a compliance with the statute requisites,

but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter. If they may dispense with a contract, then and then only can they confirm an illegal and void contract, and then, also, by any acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*. The relation which the corporation and its officers bear to the subject, the duties they owe to the public and those upon whom the burden is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts."

"The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation, nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; *and the law never implies an obligation to do that which it forbids the party to agree to do.*

"To the application of the doctrine of liability upon an implied contract, where work is performed by one the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making in direct terms a similar contract to that which is implied; but the party must also be in a situation where he is entirely free to elect whether he will, or will not, accept the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election can not influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment." (As, for example, where one puts up a house upon the land of another without request.) Citing *Bartholomew vs. Jackson*, 20 John, 28; *Ellis vs. Hamlin*, 3 Taunt, 52; *Smith vs. Brady*, 17 N. Y., 173.

It is to be noted that the charters of the cities of New York and San Francisco require that public work shall be let out, after due notice, to the lowest bidder, and the cases of *Zottman vs. San Francisco*, 20 Cal., 96, and *Brady vs. Mayor, &c., of New York*, 16 How. Pr., 422, both hold that this requirement is a pre requisite to the validity of a contract. These cases hold, therefore, in addition to the principles cited above, that even the Common Council, as a legisla-

tive department of the city government, could not, by express enactment, ratify a contract made without this pre-requisite, and, of course that the city could not be made liable for work not thus contracted for upon a *quantum meruit*, or otherwise. But the citations made above only go to the general doctrine of ratification of contracts by municipal corporations, irrespective of the particular provision of the charters referred to. That doctrine is, that a municipal corporation can only be bound in the mode prescribed by the charter; that is, in ordinary cases, by ordinance. If the corporation may contract by ordinance, it is clear it may ratify by ordinance, and the ratification would be as good to effectuate the contract as if the contract had been originally authorized by ordinance. But the ratification must be in the mode in which the corporation is authorized to contract. No action of the legislative department, much less of any of the other departments, in any other mode, would be binding.

In *Herzo vs. San Francisco*, 33 Cal., 145, the case of *Zottman vs. San Francisco*, 20 Cal., 96, is cited, and expressly approved, the court saying: "It was held in the opinion delivered by Mr. Chief Justice Field, and which is remarkable for its logical clearness and the conclusiveness of its arguments, and has since been regarded by the profession as a leading case upon the propositions therein discussed, that the city was not liable for the extra work, and could not incur an obligation in that manner; and this on the ground that the rule applicable to the corporate authorities of all municipal bodies is, that *'when the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power.'*"

In this case of *Herzo vs. San Francisco*, the facts were, that the Common Council undertook, by ordinance, to sell some of the reclaimed lands in the bay, and Herzo became the purchaser, and paid the purchase money, which passed into the city treasury, and was used as other funds of the city. The charter required a vote of the majority of the members of the council to make a valid sale. The Board consisted of eight members, one of whom resigned, and before the vacancy was filled the seven members met, and by a vote of four to three, ordered the sale. The courts afterwards held the sale void upon the ground that the ordinance was not passed by a majority of the whole council. After the sale was decreed to be void, the purchaser brought suit against the city for the money paid by him, but judgment was given against him upon the ground, that, although



traced to the city treasury, it was not shown that it had ever been appropriated by the city by a specific ordinance referring to it.

“The city, in our opinion,” say the court, “not being responsible for the acts of her assumed agents up to and including the placing the money in the treasury, and the money being then the money of the plaintiff, responsibility for the money does not attach to her till she has converted it to her own use. The unauthorized act of the Treasurer in paying it out to a third person is not the act of the city, and it makes no difference in this respect, whether he pays it to a creditor of the city, or to any other person. The city could not rightfully do anything with the money; and to be responsible for it she must have wrongfully converted it to her own use, and this she must have done by some corporate act, and the only act competent for that purpose was an appropriation, for that is the only manner in which she can dispose of money. The report of the Secretary of the Land Committee and of the Treasurer, and the acceptance of the reports by the Common Council, neither changed the ownership, the custody or control of the money—it still remained in the hands of the Treasurer and continued the property of the plaintiff.”

“It is not intended,” add the court, “to controvert the position of the plaintiff, that if the city received the plaintiff’s money, she is liable in an action for its recovery, for it is correct beyond a doubt; but the important question in the case must first be decided: did she receive the money? Nor is it intended to deny it to be a rule of law that the principal, whether a natural or an artificial person, is responsible for the acts of his agents while they are acting within the scope of their employment; and, as a necessary inference therefrom, that when they are not so acting, he is not responsible.”

“The immunity of the city from responsibility for the unauthorized acts of her assumed agents can work no greater hardship than would occur if the present principal were a private corporation or person, for in each case, those who deal with those professing to be agents, must see that they are such agents and invested with proper authority; and if they are not what they assume to be, they are responsible for their acts, and in the one case as well as in the other, the person dealing with the pretended agent may follow the property improperly obtained from him.”

“The fact that the treasurer may have paid portions or all of the money to the creditors of the city, can make no difference in principle; for if he was not empowered and directed by the city authori-

ties to make such payment—and the only mode in which she could act in conferring such authority, was through the medium of an ordinance appropriating the money—it would amount to no more than a voluntary payment made by any other person, or the same officer out of other funds of which he may have procured the possession, either rightfully or wrongfully, but without the direction, aid or assent of the city government or any of its authorities.”

We have already seen in *Zottman vs. San Francisco*, 20 Cal., 96, that a contractor failed to recover for extra work done for the city by a change in the original plans, although expressly authorized to do the extra work by the committee entrusted with the supervision of the original contract; and although all the members of the Common Council must have been aware of the order for the extra work, and the work itself was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member. This is a very strong case upon the rule that a ratification can only be in the mode in which the act could have been originally authorized. The same subject was considered by the same court in *Phelan vs. County of San Francisco*, 6 Cal., 531. There a particular act which the law required to be done by the supervisors of the county, was sought to be sustained by showing that, although the supervisors had not acted upon it collectively, they had each individually approved it. The court say: “We are satisfied that a legislative body, like the Board of Supervisors of a county, cannot be bound by acts in *pais*, but that the best and only evidence of its acts and intentions is to be drawn from the record of its proceedings.” This is cited approvingly in *Argenti vs. San Francisco*, 16 Cal., 272, and is perhaps the only sound rule.

The weight of authority seems, therefore, to be, that the officer of a municipal corporation can not bind the corporation without ordinance, where the charter specifies that as the mode in which the corporate powers shall be exercised. And every person who deals with such officer, or becomes the holder of negotiable securities purporting to be issued by the corporation, must, at his peril, see to the authority under which the officer acts, or the paper is issued. Any other doctrine, to use the words of the Supreme Court of the United States in the case of the *Floyd Acceptances*, would enable the officers of a municipal corporation, for the time being, “to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority and without limit.”



*Taxes, and Sale of Real Estate for Non-payment of, &c., &c.*

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The principle upon which taxes upon real estate are levied and collected, and the modes adopted to attain this end, should be, in some measure, known to all men. To the *jurist* it is important, because he is called upon, either as a lawyer or judge, to argue, expound and decide questions arising herein, full of minute and technical difficulties, and involving at the same time, principles reaching back to the theory of government, and the relation of the citizens; to the legislator it is important because it devolves upon him to pass the act by which the government is to be supported, its obligations discharged, and each citizen made to contribute equally, in one sense, and proportionately to his wealth, in another sense, to discharge these general and common burdens; to the citizen it is of deepest consequence, because his property is involved, and it is in his name that the legislator and jurist act, and upon his rights, and the error of each, directly or consequentially, affects him or his property.

It is somewhat astonishing that a subject demanding the thought and attention of all classes of citizens, and involving so many and such varied interests, sometimes appealing to the honor and good faith of the State, always appealing to the honor and sense of justice of each citizen, should have been so neglected that to-day, no lawyer could pronounce confidently to his client that any particular tax-sale communicates a good and perfect title, and there are but few who could not file a bill or issue a writ of ejectment, for the recovery of any piece of real estate, the title to which was claimed by virtue of a tax-sale, without clearly scrutinizing the records of the sale. Of all the methods known to the law by which the title to real estate may be acquired, this arising from a sale for taxes is the most uncertain and doubtful, if it be possible at all.

These sales are made at the instance of government, are based upon governmental necessity, originate at the hands of government officers, conducted through the courts by *sovereignty* or its agents, and yet, the character of the title communicated, is of such small regard and carries with it such little respect, that the defaulting owner does not give a second thought to the matter upon seeing the land adver-

tised for sale, and in most cases has not the curiosity to attend the auction.

This is not the feeling by which he is actuated if the sale has been ordered at the instance of his individual creditor; then he bestirs himself, and the whole family is aroused by the fact that the home is about to be lost, and efforts are made to postpone the sale, or discharge the debt.

The want of interest in, or respect for, a debt due from the citizen to the government, if the debt be based upon a right of taxation, we greatly suspect originates in the feeling that such debts are *unnatural*, and could never arise out of man's natural condition, but springs alone from social and governmental reasons; and before these debts will ever receive other than indifference, if not positive hatred, the feelings of the tax-payer must be changed. He must be educated to the point, both in head and heart, to realize his relation to his government, and his *personal and individual necessity for government*.

Let him ask himself the question, How is it that *I alone* have the right to use and cultivate this parcel of land upon which my house stands in part, and *I alone*, of all the millions of men, have *this* right, and can stand upon it and forbid all others from coming upon it. Standing upon it I am equal to all the rest of mankind—and in this respect I am a majority of *one* as against any and every body. He can well say not only is it mine to have, use and enjoy while I live, but mine to do with as I please when I come to die, mine—"my heirs and assigns forever." Vain man! Standing alone, or standing upon *any natural* rights, could you so defiantly and proudly have asserted your claims, and could not your vain boast have aroused the envy and hatred of some natural "bully," who, in a feat of fisticuffs, would *naturally* try titles with you?

The legal fiction called "title," carries with it absolute rights to, and a well defined property in "land or other thing," which may be the subject of ownership, was never found in a state of nature, but is purely a contrivance of government, which creates the *factum*, defines it, confers and enforces it. It is an ideal thing which no man in a state of nature could ever have conceived, as are also evidences of this title such as deeds, wills, &c. A man who is the possessor of these evidences, government through all its departments, declares the land to be his; whether he is truthfully and honestly the owner of these evidences, or another is, becomes a question

for the courts, and with these come also a long train of officers and expenses.

To confer property and protect it, to defend the life and liberty of the citizens, necessarily involves large sums of money, and without money none of the rights, duties, responsibilities or obligations of the government could be carried out. Money, therefore, is not an *incident* to government, but a *necessity*. Taxes are not the charitable donations of citizens, to be given or withheld at pleasure; are not mere political duties that the citizen may or may not discharge at his option, but are high *moral obligations*, based upon considerations of immense value.

Therefore, every citizen of a State is called upon to furnish his *pro rata* share towards the expenses of his Government, and when the share of each has been ascertained and set down to him, his personal and moral honesty is involved in its discharge. He can contract no debt to his merchant, or other person, based upon a higher consideration or involving in its discharge a greater moral responsibility. We venture the assertion, that if a list of the defaulting taxpayers could be made out, and the moral character of each analyzed, or even their general reputation among their neighbors ascertained, that the result would show that eight-tenths of them are men who are not esteemed as honest, and are men whom their neighbors would not permit to become the administrators of their estate or the guardians of their children. Government is felt to be a necessity, and men recognizing this have banded themselves together under Government in some one of its forms, and each has impliedly agreed that he will contribute his proportional part towards paying off its costs and expenses, and he who refuses to do so is false to those who have trusted his government, base to the government, and deserves the odium of all his fellow-citizens, whom he has betrayed. He is recreant to his moral obligations, to the creditor of the government, a breaker of all his political faith to his government, and bankrupt in his social obligations to his fellow-citizens. He should not be trusted in a common venture of a dozen. We have allowed ourselves to be carried off from the original intention and legitimate object of this article, in a denunciatory pursuit of a class of men who are annually growing more numerous, with the hope that the public morals, now so enfeebled, may become energized, and that these men who are passing through society as good citizens may be detected, pointed out and spurned; and that all squeamishness about tax titles may be done

away with, and that each citizen may feel as free to buy a parcel of land sold for taxes, and the court as swift to condemn it, as either would be, if the sale was asked or had for the purpose of selling the debtor's land to pay a merchant's bill or a lawyer's fee.

If all the acts of the Legislature passed on the subject of sale of lands for the non-payment of taxes could be brought before the eye of a single reader, it would be sufficient amusement for the time to be allowed to set silently by and watch the emotions that would express themselves in an honest tell-tale face, and we should be greatly surprised if he did not lay down the collection with feelings akin to the views of a man who had waited an hour in watching a pack of terriers and boys catching rats: "Well, boys, you did catch *SOME*, but *some* got away!"

In legislating upon nearly every other subject upon which our modern legislators are called to act, except that of the sale of land for the payment of taxes, the rules and principles directly applicable may be drawn from the grand old store-house of the common law, and this may in some degree account for the character of legislation that has controlled this subject. Neither the courts nor the legislatures have had the benefit of a common law back-ground upon which to lay down the statute, ascertain its defects, and simply adapt, to present conveniences, a building already built. Therefore, we will be justified in the assertion, that legislation and judicial decisions upon this subject, bear strong marks of "original originality." In verification of this, let us take one act of the Legislature and two decisions of the Supreme Court of Tennessee.

In passing the Act in question, the Legislature seems to have been driven to a desperate point, and to have made up its mind to hold the defaulters to the condemnation and sale, and therefore, by an Act passed January 18, 1844, (See Nicholson's Supplement, page 259,) it provided: 1st. That, in order to make a sale of land made for taxes valid, and communicate a good title, it must appear that the land lies in the county in which it has been reported; 2d. That it has been duly reported; 3d. That an order of sale has been awarded; 4. That the sale of the land was duly advertised; 5. And the sheriff's deed reciting all these facts shall be *prima facie* evidence of their existence; 6. All judgments or orders of sale shall be conclusive, unless the person wishing to show the irregularity of the same can prove that the taxes were duly paid before such judgment or order of sale was rendered. Certainly, the land could not have been "duly reported"

if the taxes had already been paid. After the passage of this Act, we may well suppose that no man will allow his land to be sold for taxes; but if any should do so, such will have but *one* attitude in which to attack the judgment, viz: by showing that the taxes had been paid, and therefore fasten malice or great negligence upon the officer whose duty it was to report it to court. This, we presume, is the only stand-point from which the court will permit him, now, to assail the judgment or order of sale; and so the Circuit Judge charged a jury in the case of *Tharp vs. Hart*, 2 Sneed, 569; and the Supreme Court, in commenting upon this charge, (Totten dissenting) say: "Tax sale titles had become so proverbially worthless, on account of the strictness required in the proceedings, that the collectors of the public revenue were seriously obstructed for want of bidders, and the owners of land became entirely indifferent about the payment of their taxes. Thus, vast quantities of land remained untaxed from year to year, and the owners, with impunity, avoided their just share of the public burdens. This strong statute was evidently intended by the framers to preclude the land-holder, who is in default, from taking advantage of these irregularities and defects in the proceeding, which had been previously regarded by the courts as sufficient to award the title to the purchaser. This would give confidence to bidders, and ensure the collection of the State and county taxes, and thereby remedy the existing evil." Speaking of the defaulter, the Court say: "He shall not, to the injury of one who has bought the land at a public judicial sale, and thus paid his taxes for him, and which he has not refunded by redemption, invalidate the sale and title by technical objections. He does not stand in a condition to be favored, as he has not complied with his obligations to the government whose protection he has enjoyed. Against him the judgment and order of sale are made conclusive. The charge of the Circuit Judge must be sustained, or the plain language of the law disregarded. The judgment and order of sale are made conclusive against the plaintiff until he can show that his taxes had, in fact, been paid; and then, and not before, can he be heard to make objections to the regularity of the proceedings under which the defendant became purchaser of the land."

This opinion certainly echoes the sentiment that actuated the passage of the law, and indicates the reasons and principles upon which taxes are levied and collected, and justly visits upon the defaulter the penalty of his neglect. The next case to which we shall

refer is the case of *Henderson vs. Starett*, 4 Sneed, 470. The action was ejectment; the defendant had bought the land at a tax sale, and was in possession. On the trial, the defaulting tax-payer offered to read the advertisements of tax sales under which the land was bought, to show that the description given in the advertisement did not sufficiently describe the land. The court below decided "that the irregularity of the sale could not be shown unless the plaintiffs first showed that the taxes had been duly paid on the land; and that not having been done, the evidence was ruled out."

This cause was likewise carried to the Supreme Court, and that Court say: "We held in *Tharp vs. Hart* that the *validity of the judgment and order of sale in tax sales* could not be impeached, unless it was first shown that the taxes had in fact been paid before the judgment of condemnation. This does not expressly embrace the advertisement and sale. Before that Act, (1844, cited above,) all the proceedings were open to attack, without any condition or limitation; and by it we think, upon a fair construction, the law is only changed so far as to make the *judgment and order of sale*, and of course all previous proceedings, conclusively correct, unless it be shown the taxes were paid anterior to such judgment." But not so as regards matters occurring subsequent, such as advertisements, etc.—these are all open to attack, say the Court.

This decision, it will be admitted, whittles the matter down to a *very fine* point, and reminds one of the charge of a Circuit Judge to a jury, upon the question whether or not a married woman could make a valid legal contract of debt. The Judge told the jury that he must tell them that the law was, that "a married woman could not make a *binding legal* CONTRACT, by which she could charge herself with a debt; but, gentlemen, I must also say in this connection, that I think a married woman could *have an* UNDERSTANDING with a party, and thereby bind herself to pay a debt."

Imprisonment of the delinquent, distress of goods and chattels, were the modes of the common law for collecting taxes. Auxiliary to these were some Exchequer proceedings, of which, practically, we know but little; and none of our elder law writers, Kent and others, have contributed anything directly, or very little, to elucidate this subject. These two facts have doubtless contributed largely to the conflicting decisions of the various States, and not unfrequently of the courts of the same State, and also to much of the loose legislation which has been had upon this subject. Until recently, there



has been no common source to which all might apply, and by comparison and addition, from time to time, build up a system of laws and decisions consistent and harmonious, and so plain and intelligent that any ordinary capacity could compass it. Heretofore the statutes have been framed under the influence of some local policy; and this same policy has entered largely into their construction, (see 14 Peters, 322,) and the statute has been materially altered by almost every succeeding Legislature; and therefore, the judicial decisions have been merely constructions of statutes, and may be regarded merely as the law of the case decided, and are not esteemed by the profession as doing much more. And yet, in this bewilderment and uncertainty, the courts have continually held these statutes to be rules of property; and in theory this is still true, even in those States the courts of which have never sustained a single tax title.

The exorbitant extent to which the debts of many of the States, counties and municipalities have been carried, and the consequent necessity for a high rate of taxation, at a time when the Federal Government has made itself a dormant partner in the profits of every man, indicate this as a proper time to look into the question of legislative power, and constitutional limitations of these powers. A profound statesman (see *Federalist*, No. 30,) gave as a reason why government, by implication, had the power of taxing its citizens, was to protect the citizen from "continual plunder," to which he would be exposed by the necessities of the government and the exorbitant greediness of its officers and agents. This is regarding the government as a substitute for banded robbery, against which the citizen could not defend himself, and which found its illustration in the levies and war taxes imposed upon the citizen by the armies of the late civil war. We do not so regard either government or the right of taxation. The whole theory and right are based upon consideration, moral, social and pecuniary; and because it is government, and acknowledged head; and the government which shields my property from the rapacity of my neighbors, can not be construed to be a substitute for unlawful power, and entitled to commit the same acts of plunder, only under a different mode and name. Government itself, does not and should not refer the question of taxation to mere power, but enters upon its rightful and delicate duties under recognized restrictions, viz:

1. Revenue bills must originate in the most popular branch of the General Assembly.
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2. Taxes can only be levied for public purposes.

3. No one species of property shall be taxed higher than another of equal value; and in order to carry out this, new assessments are required to be made from time to time.

Under these restrictions much is left to the wisdom and prudence of the Legislature; and it has now become a serious question of debate whether it would not have been prudent to have inserted in the State Constitution a positive inhibition upon the Legislature exceeding under any circumstances, a maximum rate.

All the foregoing restrictions may be literally complied with, and yet the citizens be greatly imposed upon. The fact that the legislator is to be elected annually or bi-ennially, is no sufficient guarantee that he will reasonably do his duty. The potency of immense wealth, whether the same has been acquired honestly or by corrupt means, the bitterness of political parties may each be relied upon to relieve the character and secure future prosperity. The penalty put upon public and official corruption is entirely too low to secure honest public servants; besides, the means and facilities for an exposure are too meagre and ineffectual to excite the effort, and two to one the honest effort will but bring disgrace and ruin upon its author. A man may know of a piece of roguery, and yet fear the consequences of an effort to expose it, particularly before a Legislature. The alienation of land, against the will of the owner at common law, was regarded with great jealousy, and the courts usually required the strictest compliance with all the prerequisites and conditions of the sales; and this principle has been continually appealed to, and with great success, in cases involving the question of tax titles.

The chief difficulty connected with the levy and collection of taxes in most if not all the States, as a reference to the adjudicated cases will prove, is traceable to the ignorance and incapacity of the persons entrusted with it. Assessors should be men of more than ordinary

and have two features of character in a degree of trust and confidence of the community. One of sufficient knowledge of values of the land to be assessed relatively; the other, sufficient scholarship or that character of description brings the land within the statute.

ment, as it is sometimes termed, is the basis of assessment, and just here most of the errors are committed. Mistakes in costs and expenses, eventually invalidate the



sales. And it does seem that the Legislature for many years, has been doing its utmost to legislate down sufficiently low to meet and atone for the incapacity of its assessors. It has been playing the role of an English lawyer, who was drinking an unusual quantity of beer just before commencing a speech to a jury, and gave as a reason for it that he was trying to fuddle his brains down to the capacity of his jury. This custom could be "more honored in its breach than observance."

Listing, besides being the substratum of all the other proceedings, is a constitutional requirement, in order to ascertain the value of the taxables, and thereby determine the *rate*; it is also necessary in order to know the *pro rata* share of each citizen, and to keep up with the continual changes of property from hand to hand. This list is indispensable to the collector to inform him of the amount to be collected from each citizen, and is the only security that the citizen has that an exorbitant amount will not be collected of him. It is also necessary to the State in its settlement with the collector. Its chief importance, however, consists in the fact that it secures a uniformity of taxation. Usually the most important work is placed in the most incompetent hands, and therefore it would be safe to assume that by far the greater proportion of tax sales that are declared void find the cause just here; in fact, it is well known that but few men recognize their lands as exhibited upon the tax books. The particular estate which one may own in the property, whether a naked trustee, tenant, or common, or life estate, &c., &c., we venture was never dreamed of by a large majority of the assessors.

And yet the list is passed to the collector, who, after keeping it for a time, returns it to court, and the description and ownership described therein is the only description by which it may be sold. Either the Legislature should abolish all description, and make it a proceeding *in rem*, or abolish incompetent assessors. It should demand bonds and security from its assessors, as well as its collectors, for a faithful discharge of their duties; and whenever the State or the purchaser of a tax title should lose the benefit of the purchase by means of a failure on the part of this officer to discharge his duty, let him be held to the damages. A greater amount by far has been lost to the State by reason of incompetent assessors—incompetent in mere scholarship and intelligence—than has been lost by collectors failing to pay over, to say nothing of losses to the citizens who may have purchased. The courts of no State have looked more closely

into the duties of assessors, or have determined more cases upon the manner in which assessors have discharged their duties, than have the courts of Tennessee, in proportion to the number of tax titles that have come before them for adjudication. Notwithstanding this, we venture the assertion that the assessors of no State have entered upon the discharge of their duties with less positive instructions than have assessors of Tennessee.

Let us look for a moment at the statute, (Code, section 567,) and ascertain what the assessor's books are required to show :

1. The name, in alphabetical order, of each owner of the property assessed in each civil district, unless the owner be unknown, in which case it shall be so stated.

2. The description of the property.

3. The contents, when it can be known, in acres.

4. The value of the property.

5. The amount of the taxes assessed upon the same.

Take the 2d and 3d above, "The description of the property," "The contents, *when it can be known*, in acres." What character of description will fill the indefinite and general language above, in section 2? To say that it was 250 acres belonging to John Smith, is this sufficient? Land, like everything else, is susceptible of many descriptions more or less accurate. How near the accurate must it be? Section 1 provides that the name of the owner, if known, shall be given. Section 3 provides for stating the contents. Now section 2 certainly demands something more. What more? The boundaries? If so, the assessor must be a surveyor, or have the deeds before him. One court may be of the opinion that a certain character of description is sufficient, while another court will be of a different opinion. One assessor will construe the law to mean one character of description, while another will adopt a different one. Take the 3d, "The contents, *when it can be known*, in acres." It *can* always be known. It *can* be surveyed. The assessor *can* go to the Register's office, and if he is a lawyer or versed in the mysteries of that office, can tell you precisely what the title papers say on that subject. But what *can* be done, and what *must* be done, may be a very different question. One judge *can* tell a jury that it was the duty of the assessor to have examined the Register's office, while another judge would say it was not necessary. One might honestly believe that "can" exhausts all possibilities. "When it can be known," implies a possible knowledge, in such cases. The reader will see at a glance that the indefinite language of instruction to the assessors, as quoted

above, is well calculated to embarrass men of much higher intelligence, and is altogether too loose and general to be a rule of property, and as such, entitled to a very high degree of respect. If our other laws of property, such as descents, &c., were equally general and indefinite, our books would be full of contradictory decisions, as well as that most hateful of all legislation—judicial legislation.

Let us before leaving this branch of the subject, “confound confusion,” by throwing in a principle by which the judge trying a tax title may be governed in the construction of the aforesaid statute. In 1 Buss., 647, Lord Mansfield said “that there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament and clauses merely directory.” The vagueness of the rule, and the fact that some such rule exists, give a discretionary power to ministerial officers dangerous to all private interests, and not unfrequently gives a warrant to a judge to be wiser than the law. The caprice which presides in the one case and disposes of a positive statute is a very capricious caprice, and may be absent in the trial of a second and third cause, or surrender its place to a *whim* more dangerous and uncertain. This rule, if admitted at all to apply to tax laws, is to vest the legislative power in the assessor, collector, or sheriff, and allow them to dispose of property, not according to the statutory requirement, but their private opinions, and thus place at their private discretion the property of every citizen. Why could not the Legislature adopt and make positive some *reasonable description* of the land, which when complied with, should carry the title, and when not complied with should avoid the title. Every man knows that he is liable for some amount of taxes annually if he owns any realty, and knows whether he has paid it or not. And if he has not paid it, he knows that the same is being proceeded against in a certain court. And why not legislate upon the reasonable presumption of this knowledge. Such a delinquent does not deserve the benefit of all character of technicalities and conditions, to enable him to hold land upon which he refuses to pay the taxes. If it is wrong to sell land for the non-payment of taxes, let us say so; if it is right, let us determine, in plain unequivocal language, how it is to be done. And when done, let it “be the be all and end all” to the matter.

It is a notorious fact, that few persons will venture to buy property at a tax sale. The result is, it is “purchased in by the State.” And what then? Taxed the succeeding year to the same defaulting owner, and again sold for the taxes, and again “purchased in,” and

so on annually. In some cases, the owner has attempted to sell, or the property has been decreed to be sold, when lo! it took half the purchase money to pay back taxes. The result is, those who do pay their taxes have much to pay each year because of the default of others, and the rate must be annually increased to meet the accumulated interest on the public debt. The Legislature has resorted to several modes, punctual in their character, to prevent this recurring evil, all of which have failed to excite the alarm of the tax payers. One of these modes was to charge a large per centum, say fifty, when the owner did redeem. This penalty was so large, that the owner preferred to take the chances rather than pay it. His attorney would inform him, upon a ten minutes' investigation, that the sale was void for errors arising in the assessment, or in the subsequent proceedings. What necessity was there, then, in paying the penalty—or even the taxes. If the State had bought in the property, the preceding year, he would never think of redeeming, because, the State would never disturb him in the possession. If another than the State bought it in, he could rely upon errors in the record of sale with as much certainty of obtaining a verdict in an ejectment, brought against him by the purchaser, as did Antonio of winning the suit upon the bloody bond of Shylock. In truth, tax sales are so suspicious that they taint, with a like character, all who touch them; and few good citizens would like to be so much in disrepute as to have it said of themselves that they ever attempted “to cheat a man out of his land by buying it at a tax sale.” So that now, at one of these sales, but two persons are present as purchasers—one of whom is the State; the other is some hard-cheeked, imperious citizen, who, for the sake of the *centum per centum*, is disposed to gamble a little—in a legal way—at the risk of some timid man, whom he immediately sits about alarming; and these men are the plaintiffs in the ejectment suits, which they invariably lose. Why not allow the court in which the land has been condemned to issue a writ of possession to the purchaser, and put the defaulting tax payer to his ejectment or redemption. We venture, if such was the rule, that the long list, now annually filed with the Comptroller, of persons who have not paid their taxes, would diminish until it would not exceed the length of the alphabet. Taxes have become a serious matter, and it behooves all good citizens to cast about and devise the best plan by which they may be collected, and to see that each man contributes his proportional part towards the payment of a common debt.

### *The Liability of Municipal Corporations upon Instruments of Debt.*

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This is a subject of more than ordinary interest in Tennessee, from the action of some of our corporate organizations in issuing large amounts of municipal obligations, a portion of which would probably be held at least partially defective in point of consideration in a suit between the original payee and the holders. The finances of nearly every municipality of considerable size in our country, have been greatly mismanaged, and instruments issued constituting obligations upon them, the consideration of which, in the last analysis, would be found to be more or less inequitable. Especially has this been the case in regard to the bonds of counties and cities issued by railroad companies in many of the States of the Northwest and in portions of Pennsylvania, which were emitted often in flagrant disregard of the condition precedent imposed by the acts of their Legislatures authorizing the issues. And thus the subject is one of very general interest. We propose to cast a cursory glance over the field, and allude to some of the more pronounced decisions which we have met with.

The various accounts against cities and counties, constituting what is termed their floating debt, are usually settled with city and county warrants, being merely an order from one officer to another to pay to the parties entitled, the proper amounts. Usually the warrant is required to be countersigned by another corporate functionary. Thus, what were familiarly termed in Nashville "corporation checks," were orders drawn by the Recorder upon the Treasurer and countersigned by the Mayor. In some of the county cases, the orders have been drawn by the Clerk on the Treasurer and countersigned by the Chairman. These instruments are held by all the authorities to be corporate promissory notes. See Story on Promissory Notes, section 16; *Clark vs. Des Moines City*, 19 Iowa, 24; *Campbell vs. Polk County*, 3 Iowa, 470; 15 N. Y., 337; 23 N. Y., 570; 3 Manning & Gra., 576; 6 McLean, 447; *Kelly vs. Mayor, &c., of Brooklyn*, 4 Hill, 263, etc., etc. Sometimes an effort has been made to treat such words on the face of the document as, "on account of street department," &c., as restricting the payment to a particular

fund, and as, therefore, taking the instrument out of the category of promissory notes. But the courts have never sustained such a position. In *Clark vs. Des Moines City*, already cited, some of the warrants sued on, were drawn, "payable out of any monies in the East-side Road fund not otherwise appropriated," etc. And here the charter of the city provided that the moneys collected for road purposes on either side, should be expended where collected. But even here the court held that the reference to the particular fund did not concern the creditor of the city, but was merely conducive to the proper keeping of accounts between the different departments. It has sometimes been contended that the warrants could not be notes, because the charter of the corporation no where conferred the power to make a note. But it has generally been held that, independently of express statutory provisions, a corporation may issue negotiable paper for a debt contracted in the course of its legitimate business. Indeed, it is well settled that a corporation may adopt any means conducive to carry out a legitimate end. The difference between an individual and a corporation in this respect, has reference to ends not means. An individual may seek *any* end not forbidden by law. A corporation may seek only those ends contemplated by its charter. But the end sought being within the scope of the charter, all the means which would be open to an individual seeking the same end, are equally open to a corporation—that is, unless a particular means be expressly withheld. In *Union Bank vs. Jacobs*, 6 Humphreys, 515, our Supreme Court asserted this doctrine in broad language. And in 2 Coldwell, 655, the doctrine of this case was applied to municipal corporations by the same court. A legion of authorities might be cited to the same effect. Mr. Parsons, in his work on Bills and Notes, p. 164, thus sums up the result: "In this country it may be regarded as settled that the power of corporations to become parties to bills and notes is co extensive with their power to contract debts. Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment. Every corporation may, therefore, become a party to bills and notes for some purposes. Thus a mere religious corporation may need fuel for its rooms, and, as an economical measure, may buy a cargo of coal, and give its note for it; and such a note would undoubtedly be valid in this country." The instruments in question, then, are clearly promissory notes. A distinction has frequently been attempted to be made between the rules of law applicable to municipal and private corpora-



tions, but the overwhelming current of authorities is to the contrary. There are indeed, in the New England States, and in some of the Northwestern States—deriving their system of polity from them—what are called *quasi* corporations, touching which it is said that they are so feebly endowed with corporate life, and so hampered, controlled and directed in the exercise of the powers they possess, that they are sometimes spoken of as nondescript in character, and as occupying a position somewhere between that of a corporation and a mere voluntary association of citizens. They are said to be called *quasi* corporations, to distinguish them from corporations in general, which possess more completely the functions of an artificial entity. Chief Justice Parker of Massachusetts, in speaking of school districts, said: “They may be considered under our institutions as *quasi* corporations, with limited powers, co-extensive with the powers imposed upon them by statute or usage, but restrained from the general use of authority which belongs to these metaphysical persons by the common law.” One peculiarity of this exceptional character is, (7 Mass., 187,) that having no common funds and *no legal means of obtaining any*, each corporator is liable to satisfy any judgment obtained against the corporation. In *School District vs. Wood*, 13 Mass., 192, the court say that these entities are not strictly corporations, but only *municipal bodies*, and that *it will not do to apply to them in all cases, the law of corporations*. These limited corporations are not held to so strict a liability for acts of their agents, as others in the possession of a full corporate life under a charter. Says Judge Cooley, in his work on Constitutional Limitations, p. 247: “The reason which exempts these public bodies, etc., does not apply to villages, boroughs and cities, which accept special charters from the State. The grant of the corporate franchise in these cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers a valuable privilege. Larger powers of self-government are conferred than are confided to towns or counties, larger privileges in the acquisition and control of corporate property, etc.” The author adds that, in regard to the liability of these chartered municipalities for the use of their franchises, they *stand on the same footing as private corporations*, which, having accepted a valuable franchise, are held to contract by the acceptance for the performance of these duties. He further adds: “In regard to all those powers which are conferred upon the corporation not for the benefit of the general public, but of the corporators, as to con-

struct works, to supply a city with water or gas works, or sewers, and the like, the corporation is held to a still more strict liability. So that the cases which might be accumulated from the States, in which these *quasi* corporations exist, in which *in regard to these corporations*, distinctions have been taken between them and private corporations, do by no means establish that any distinctions exist between municipal corporations with charters, or counties distinctly made corporations by law, as is the case in our State, and perhaps in most other States; since we see that the distinction taken, when taken at all, is between these *quasi* corporations and determinate municipal corporations, such as villages, boroughs and cities.

It will be found that the text books upon corporation law, in support of every principle, draw their cases indiscriminately from municipal and private corporations. For instance, in reference to the principle that an express authority is not necessary to confer upon a corporation the power to deal in credit, or become drawer, indorser or acceptor of a bill of exchange, Angell and Ames, section 257, cite *indiscriminately* both classes of cases. In support of the principle that corporations are bound by the acts of their agents though not empowered under the corporate seal, and that they may be bound by implication from the acts of their agents, the same *indiscriminate* citations are made: See section 237. Some of these, indeed, seem to be cases of the nondescript *quasi* corporations we have been considering. So also, in regard to the principle that not only estoppels technically so called, but estoppels *in pais*, operate both for and against corporations: See note 3, sec. 238, same authors. Similarly as to the binding force of the agent's representations as to his authority, the Court of Appeals of New York, in *Gould vs. The Town of Stirling*, 23 N. Y., 456, cite *Farmers and Mechanics' Bank vs. Butchers and Drivers' Bank*, 16 N. Y., 125. And the Supreme Court of the United States, in what is perhaps the leading case upon the subject, in our national jurisprudence, *Commissioners Knox County vs. Aspinwall*, 21 How., 545, cite and apply the decision of the Court of Queen's Bench in the case of *British Royal Bank vs. Turquand*, 6 Ellis and Blackburn, 327. In truth, for many purposes, municipal corporations are regarded as private corporations. This is clearly set forth in *Bailey vs. Mayor, &c., of New York*, 3 Hill, 531. Here the court said that those powers granted for public purposes belonged to the corporation in its character of a government. But that in regard to those which were granted for the purposes of private advantage and



emolument, the corporation *quoad hoc* was to be regarded as a private company. That, as to these, it stood upon the same footing as an individual or body of persons on whom the like special franchises had been conferred. Similarly, in 1 Brown's Chancery, the case of *Moodalay vs. East India Company*, is cited, as showing that for some purposes, this august semi-sovereign body was to be regarded as a mere private corporation. The same views were enounced in *Detroit vs. Corey*, 9 Mich., 165; *Stoors vs. Utica*, 17 N. Y., 104; 5 Cal., 306, and in *Lloyd vs. Mayor, &c., of New York*, 5 N. Y. Reports. In the last mentioned case, the principle is thus tersely expressed: "The corporation of the City of New York possesses two kinds of powers,—one governmental and public, and to the extent *they* are held and exercised, is clothed with sovereignty;—the other private, and to the extent they are held and exercised is a legal individual. The former are given and used for public purposes, and the latter for private purposes. While in the exercise of the former the city is a municipal government; and while in the exercise of the latter, a corporate, legal individual." The probability is that by far the larger portion of city municipal action has reference to matters with regard to which the city is to be viewed as a private person.

The courts do not now lean towards the defense of *ultra vires* upon the part of a corporation. There is some plausibility in the argument metaphysically considered. For if a corporation is the creature of its charter, it would seem to follow that no action whatever outside of the charter—*ultra vires*—can be regarded as *corporate* action. But this doctrine would go too far. It would exempt a corporation from all liability for a tort, since the charter never authorizes the tort. It is now settled that a corporation may be indicted not merely for *non-feasance*, but also for *misfeasance*; 2 Gray, 339; 27 Vt., 103; 9 Q. B., 315.

In *Bank Chilicothe vs. Chilicothe*, 7 Ohio, 358, the town relied upon its want of power to borrow as a defense against a suit for borrowed money. The Court made use of the following language: "Although corporations have existed for centuries, *we have found no case where inability to contract has been set up to avoid payment of their debts*. There are, it is true, many cases where the powers of particular corporations have been investigated, and they have been held to have exercised powers not granted to them, in consequence of which their acts were void. But these have been cases where the corporations themselves have been striving to set up or enforce powers; not

where they have set up as a defense that they had themselves been guilty of a usurpation of power. \* \* \* A different rule of construction ought to prevail where a corporation is endeavoring to extend its power to the injury of others, or where it sets up by way of defense to an action brought against it, that it has itself been guilty of a usurpation of power." Similarly, in 2 Cold., 660, our own Supreme Court ruled that, while the power under which the Mayor and Aldermen of Memphis had acted was doubtful, it did not lie in the mouths of the city authorities to repudiate their own acts. These cases would seem to hold the corporations liable for action beyond their chartered powers. We hardly think, however, that their true meaning as limited by the implied reference to the facts of the cases, goes farther than this, namely, that the courts will strongly lean against defenses growing out of nice constructions of chartered power. For it is distinctly held that the person dealing with the corporation is bound to take notice of the extent of this power. But we shall see that, where the power exists in the corporation, it is held liable for the acts of its agents and officers, even where they have failed to comply with the requirements as to the modes and pre-requisites of its exercise. And this is the category containing the vast bulk of the cases against corporations upon their obligations for money.

The leading case in the national jurisprudence upon this subject is that of *Commissioners of Knox County vs. Aspinwall*, 21 How., 540, a suit on coupons from county bonds, issued for subscription to the Ohio & Mississippi Railroad Co. The defense was that the statute authorized the Commissioners to subscribe *only after an election properly held*, and a majority vote in favor of the subscription; and that the election had *not* been properly held, and so *the requisite sanction never been given*. The Court said: "The act in pursuance of which the bonds were issued is a public statute; and it is undoubtedly true that a person dealing in them is chargeable with a knowledge of it; and, as this board was acting under delegated authority, he must show that the delegated authority has been properly conferred. The Court must, therefore, look into the statute for the purpose of determining this question. Upon looking into it, we find that full power is conferred upon the board to subscribe for the stock and issue the bonds, when a majority of the voters of the county should have determined in favor of the subscription, after due notice of the time and place of election. The case assumes that the requisite notices

were not given of the election, and hence that the vote was not in conformity with the law. This view would seem to be conclusive against the authority of the board, *but for a question that underlies it, and that is, who is to determine whether or not the election has been properly held and a majority of the votes of the county cast in favor of the subscription?* Is it to be determined by the Court in this collateral way, or by the Board of Commissioners, as a duty imposed upon it before making the subscription? The Court is of opinion that the question belonged to the board. \* \* \* We do not say that in a *direct* proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third persons had attached, the decision of the Board would be conclusive; but after the authority has been executed, the stock subscribed, the bonds issued, and in the hands of innocent holders, it would be too late, *even in a direct proceeding*, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way. \* \* \* Another answer to the defense is, that the purchaser of the bonds had a right to assume that the vote of the county which was made a condition to the grant of the power had been obtained, from the fact of the subscription by the board to the stock of the railroad company, and the issuance of the bonds. The bonds on their face import a compliance with the conditions of the grant of the power. This principle was recently applied in a case in the Court of Exchequer in England, 6 Ellis and Blackburn, p. 327. *The British Royal Bank vs. Tarquand*. The defense was a want of power under the deed of settlement or charter, to give the bond. One of the clauses in the charter provided that the directors might borrow money on bonds in such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed. The resolution was considered defective. Jervis, C. B., in delivering the judgment of the Court, observed: 'We may now take it for granted that the dealings with these companies are not like dealings with other partnerships, and that parties are bound to read the statute and deed of settlement. But *they are not bound to do more*. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority *might* be made complete by a resolution, he would have the right to *infer the fact of a resolution* authorizing that which on the face of the document appear-

ed to be legitimately done.' See also 5 Ellis and Blackburn, p. 245, and 25 E. S. & Eq., p. 114. The principle we think sound, and it is entirely applicable to the question before us."

The English Bank here referred to, was incorporated under a general statute providing for an instrument called a deed of settlement, defining the powers and liabilities of the bank, which when duly recorded became its charter.

To the same effect is a series of decisions by the same tribunal, to which our space allows us merely to refer e. g. *Commissioners Knox Co. vs. Wallace*, 21 How., 540; *Bissell vs. City of Jeffersonville*, 24 How., 287; *Gelpeke vs. Dubuque*, 1 Wal., 175; *Van Hostrep vs. Madison City*, 1 Wal., 297; *Supervisors vs. Schenck*, 5 Wal., 783; *Lee County vs. Rogers*, 7 Wal., 183, etc., etc.

In the second mentioned of these cases—*Bissell vs. Jefferson City*—the Act had provided that the subscription should be made subject to the following restrictions, etc., *and in no other way whatever*; the restrictions being: 1. That the subscription should be designated, advised and recommended by a grand jury of the county; 2. That, in no case, should the bonds be sold under par; 3. That the acceptance by the railroad company of the Act authorizing the subscription should be deemed and taken as their acceptance of the Erie Gauge Act of March 11, 1851.

The defense was, that no grand jury had ever made the recommendation required; that the bonds were sold at 66½ cents on the dollar; and that the railroad company had distinctly and expressly repudiated the Erie Gauge Act. But the Court said: "We have decided in *Commissioners Knox Co. vs. Aspinwall*, that when bonds, on their face, import a compliance with the law under which they were issued, the purchaser is not bound to look farther." In *Gelpecke vs. Dubuque*, 1 Wal., 175, Judge Swayne said: "When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has the right to presume that they were issued under the circumstances which give the requisite authority, and they are no more likely to be impeached in the hands of such holder for any infirmity, than any other commercial paper." In this case, which came from Iowa, the Supreme Court of the United States decided in conflict with the decisions of the State Supreme Court. Similarly, in *Mercer Co. vs. Hackett*, which came from Pennsylvania, and in a case from Illinois, the Supreme Tribunal of the Nation held contrary to the decisions of the highest courts of these respective

States. Judge Miller, of Iowa, steadily and with much feeling, dissented from these decisions, adhering to the Iowa ruling of the bonds. He appears to have been much exercised at the rulings of the United States Supreme Court, which he vainly resisted, saying, in *Briggs vs. Johnson Co.*, 6 Wal., 201, in reference to *Gelpeke vs. Dubuque*: "After this decision, no matter how illegal, fraudulent and void were corporation bonds, no defense could be made to them in the Federal Courts; and, of course, they were all sued on in those courts."

In the Floyd Acceptances, 7 Wallace, this Judge does not, of course, assume to decide anything in conflict with the principles distasteful to him, so often affirmed by the Court. But he takes occasion to relieve his wrath by throwing out some *dicta* criticising the doctrine announced by the Supreme Court in *Gelpeke vs. Dubuque*, and reiterated in *Supervisors vs. Schenck*. There is, however, *no conflict* in the cases. In the case in 7 Wallace, the acceptances are pronounced void, because, if they were given in payment of supplies furnished, as claimed, they were payments in advance, and specially prohibited by the Act Jan. 21, 1823.

In the second place, the Court say that, under existing laws, *there could be no lawful occasion* for any officer of the United States Government to accept drafts on the Government: See p. 681. If, under *any* circumstances, the drafts could have been properly accepted, then the principle decided in *Gelpeke vs. Dubuque*, etc., would have come in play. But if, under no circumstances, the law authorized the acceptances, of course the holder could not claim the benefit of *bona fides*.

This is the vast distinction between this case and the others referred to. The powers of an officer of the United States are derived from a *statute*, which every one is bound to notice. But the power of officers of corporations, municipal or private, are usually conferred by the by-laws or ordinances, which the person dealing with the corporation is not bound to look to. The purchaser of the corporate obligations is only held to a knowledge of the charter, and need not look to the action of the officers acting under it. And when, by the charter or some special law, certain prerequisites are to be complied with before the paper of the corporation is issued, the corporate officers are *impliedly* made the judges as to the fact of such compliance, and their action estops the corporation from denying their power. This principle is clearly set forth in *Farmers' and Mechanics' Bank*

*vs. Drivers' Bank*, 16 N. Y., 128, which was a suit on a certified check. The defense was, that the Teller, merely as such, had no right to certify the check, and that, so far from being authorized, he had been forbidden to do so, unless the drawer had funds enough on hand to cover the check, and that here there were no funds on hand. But the Court held that the Teller's act in certifying was an implied declaration that he had the power to certify, and that this estopped the Bank, inasmuch as third persons could not know what powers had been given him, but must accept his statement; and the Bank, by putting him in a place of trust, had held him out to be trusted by the public. In *Gould vs. Town of Sterling*, 23 N. Y., 459, the Legislature had authorized Commissioners of the town to subscribe to a railroad, after a petition had been filed, signed by three-fourths of the tax-payers. The bonds were issued without the necessary petition being filed. The Court, indeed, held them void, but because the Commissioners were *not the regular officers of the town*, being specially foisted on it by the Legislature for a particular purpose. The Court expressly say that the principle of the Bank Teller case would have controlled the case, if the Commissioners had been the regular officers of the town. They say, p. 463: "The reason upon which this rule is founded is given by Lord Holt, 1 Salk., 289, that where one of two innocent persons must suffer through the misconduct of another, it is reasonable that he who had employed the delinquent party, and thus held him to the world as worthy of confidence, should be the loser." To the same effect is *De Voss vs. City of Richmond*, 18 Grattan, 338.

These doctrines have found a pertinent application in the decision of suits brought in the Federal Court at Nashville, on the checks or warrants, and the bonds and coupons of the city. These have been held, of course, to be entitled to all the presumptions incident to negotiable paper, viz: that they were given for a legitimate purpose; and that the holder took them for value, before dishonor, in the usual course of business. And inasmuch as the checks were ordinarily issued by the Recorder upon allowances made by the Board, and were afterwards countersigned by the Mayor, the issuance by the Recorder implies an assertion upon his part of what he was the official charged specially with the knowledge of, namely, that the proper allowances had been made where the checks were issued. The principle of the Bank Teller case estops the city to deny this. The holder, since the Mayor and Recorder were elected by the corpora-

tion, and held out in their respective positions to be trusted, had the right to assume from their signatures the existence of all the prerequisites to the valid issuance of the instruments. And this aside from the principles protecting the *bona fide* holder of negotiable paper. He had, further, the right to reinforce his position by calling to his aid these principles, in addition to the estoppel above mentioned.

It may be added that here the liability was more tightly clinched by the continued past reception of the instruments for taxes. Long usage had made the promise of such reception a part of the very obligation.

The payment of its paper is an admission of its validity which binds a corporation: *State vs. Union Township*, 8 Ohio St., 401; *Town Keithsburg vs. Frick*, 34 Ill., 421.

Our limits do not allow us to trace this interesting subject farther, though we are conscious that the foregoing is a very inadequate presentation of it.



*Digest of United States Supreme Court Decisions.*

[From 11th Wallace.]

ACTION.

WHERE the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from such nonfeasance or malfeasance. A mistake as to what his duty is, and honest intentions, will not excuse him. *Amy vs. The Supervisors*, 136: See also *Public Law*, 1.

ADMINISTRATOR.—See *Public Policy*.

ADMIRALTY.

If a vessel at anchor in a gale could avoid a collision threatened by another vessel and does not adopt the means for doing so, she is a participant in the wrong, and must divide the loss with the other vessel: *The Sapphire*, 164.

AGENCY.—See *Notice*, 2.—BILL OF EXCHANGE.—See *Negotiable Paper*.

CONFISCATION ACTS.

1. Of August 6th, 1861, and July 17th, 1862, are constitutional. Their character described, and mode of making seizure of stocks under: *Miller vs. United States*, 268.

2. The owner of property, for the forfeiture of which a libel is filed under the latter act of the above mentioned, is entitled to appear and to contest the charges upon which the forfeiture is claimed, although he was at the time of filing the libel, a resident within the Confederate lines, and a rebel; and he can sue out a writ of error from this court to review any final decree of the court below con-  
*McVeigh vs. United States*, 259.

OF JURISDICTION.

courts, being independent of each other, in any action the other may take, within the jurisdiction of its judgments and decrees, 136.



## CONFUSION OF GOODS.

Where distilled spirits forfeited to the United States are mixed with other distilled spirits belonging to the same person (ignorant of the forfeiture), they are not lost to the government by such mixture, either on the principle of confusion of goods, or transmutation of species, even though subsequently run through leaches for the purpose of rectification. The government will be entitled to its proportion of the result: *The Distilled Spirits*, 356.

## CONSTITUTIONAL LAW.

1. The consent of Congress required by the Constitution to validate agreements between the States, need not be by an express assent to every proposition of the agreement. It may be inferred from legislation: *Virginia vs. West Virginia*, 39.

2. Congress can not impose a tax upon the salary of a judicial officer of a State: *The Collector vs. Day*, 113.

COURT OF CLAIMS.—See *Sovereignty*.

## EQUITY.

1. Is disposed to uphold settlements intelligently made for the sake of peace: *May vs. Le Claire*, 217; *Eureka Co. vs. Bailey Co.*, 488.

2. Will follow against a trustee abusing confidence, proceeds of trust property converted by him into money, and mould remedies so as to give the injured *cestue que trust* complete relief: *May vs. Le Claire*, 217.

3. And decline to remit parties, on breach of contract, to law for damages, though the contract be no longer capable of fulfillment, unless the remedy at law be as effectual as equity can make it: *Ib.*

4. Affects a client profiting by his counsel's inequitable doings with notice of what he inequitably did: *May vs. Le Claire*, 217, and see *The Distilled Spirits*, 356. See also *Tax*.

EVIDENCE.—See *Negotiable Paper*.

## JURISDICTION.

*Of the Circuit Courts of the United States.*

1. They have not jurisdiction in controversies between citizens of different States, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, unless each plaintiff be competent to sue; executors and

trustees suing for others' benefit forming no exception to this rule: *Coal Company vs. Blatchford*, 172.

2. Nor in a suit by a citizen of one State against a corporation, the declaration averring only that the corporation was created by act of Legislature of another State (named), is located in that State, and doing business there under its laws: *Insurance Company vs. Francis*, 210.

#### NATIONAL BANKS.

1. Can make no valid loan or discount on the security of their own stock, unless necessary to prevent loss on a debt previously contracted in good faith: *Bank vs. Lanier*, 369.

2. The placing by one bank of its funds on permanent deposit with another bank, is a loan within the spirit of this enactment: *Ib.*

3. Loans by, to their stockholders, do not give a lien to the bank on the stock of such stockholders: *Ib.*

#### NEGOTIABLE PAPER.

In a suit on a negotiable security, when the defendant has shown strong circumstances of fraud in the origin of the instrument, this casts upon the holder the necessity of showing that he gave value for it before maturity: *Smith vs. Sac County*, 139.

#### NOTICE.

1. One who purchases railroad bonds in open market, supposing them to be valid and having no notice to the contrary, is a holder *bona fide*: *Galveston Railroad vs. Cowdrey*, 459.

2. The rule that notice to the agent is notice to the principal, applies not only to knowledge acquired by the agent in the particular transaction, but to knowledge acquired by him in a prior transaction, and present to his mind at the time he is acting as such agent, provided it be of such a character as he may communicate to his principal without breach of professional confidence: *The Distilled Spirits*, 356.

#### OMNIA RITE ACTA.

In a collateral proceeding, to set aside a sale made under a judgment of another court, it must be shown that such court had no jurisdiction of the case. It is not enough to show mere errors and irregularity. The doctrine applied to a sale under the Attachment Laws of Tennessee against a rebel absent in the rebel service: *Ludlow vs. Ramsey*, 581.

## PRACTICE.

1. *In the Supreme Court.*

1. Bills of exceptions need not be sealed. It is sufficient that they be signed by the Judge: *Generes vs. Campbell*, 193.

2. When the citizenship of the parties is averred in the bill of complaint, and it thus appears that some of the plaintiffs are disqualified by their citizenship from maintaining the suit, the defect may be taken advantage of by demurrer, or without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment: *Coal Company vs. Blackford*, 172.

11. *In Circuit and District Courts.*

Congress has adopted for common law suits in the Federal courts the modes of procedure prevalent in the State courts, and where these are disregarded in the Federal courts, proceedings will be set aside: *Moncure vs. Zuntz*, 416.

PROMISSORY NOTE.—See *Negotiable Paper*.

## PUBLIC LAW.

1. A foreign sovereign can bring a civil suit in the courts of the United States: *The Sapphire*, 164.

2. In the war of the rebellion the United States having had belligerent as well as sovereign rights, had a right to confiscate the property of public enemies wherever found, and also a right to punish offenses against their sovereignty: *Miller vs. United States*, 269.

3. The right of confiscation exists in case of a civil war as fully as it does when the war is foreign, and rebels in arms against the lawful government or persons inhabiting the territory exclusively within the control of the rebel belligerent, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory: *Ib.*

PUBLIC OFFICER.—See *Action—Rebellion*, 1.

## PUBLIC POLICY.

A loss sustained by a surety in the administration bond, who has entered into the suretyship under a representation from a firm of which the administrator was a member, that they intended to take into the possession of the partnership all the assets of the intestate,

to make the administration a matter of partnership business, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would become the surety of the firm and not of the individual partner, can not be recovered by the surety from the firm: *Forsyth vs. Woods*, 484.

RAILROAD BONDS.—See *Notice*, 1.

#### REBELLION.

1. Suspended the running of statutes of limitation during its continuance, in regard to the claims of the government against its own citizens resident in the rebellious States. Nor did the act of June 11th, 1864, change this: *United States vs. Wiley*, 508.

2. As also as against persons in the loyal States, the running of the prescription given by articles 3505 and 3506 of the Louisiana Code, prescribing bills and notes in five years from their maturity, and providing that this prescription run against minors, interdicted persons, and persons residing out of the State: *Levy vs. Stewart*, 244.

#### SOVEREIGNTY.

No judgment for the payment of money can be rendered against the United States in any court other than the Court of Claims without a special act of Congress conferring jurisdiction: *Case vs. Terrill*, 199.

STATUTES OF LIMITATION.—See *Rebellion*, 1, 2.

#### TAX.

Collection of, will not be restrained in equity only because illegal. Grounds for *equitable* aid must be shown: *Dows vs. City of Chicago*, 108.

UNITED STATES.—See *Sovereignty*.

## SELECTED DIGEST OF STATE REPORTS.

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[For the present number of the Digest, selections have been made from the following volumes of State Reports: 19 Michigan; 2 Heiskell; (Tennessee); 33 Maryland; 29 Iowa; 51 Illinois; 25 Arkansas; 19 Ohio (Critchfield); 36 Connecticut; 47 Missouri; 103 Massachusetts; 28 Texas; 14 Minnesota; 3 Lansing (New York); 40 Georgia; 5 Kansas (Banks); 48 New Hampshire; 57 Maine; 25 Wisconsin; 20 Grattan (Virginia).]

ACCEPTANCE.—See HIGHWAY, 1, 2.

ACCOUNT.—See PARTNERSHIP, 4, 5.

ACCOUNTING.—See ACTION, 1.

ACKNOWLEDGMENT.—See LIMITATIONS, 1.

### ACTION.

1. In an action for an accounting, the judgment should be conclusive, upon the parties upon all questions between them, arising on the accounting.

In an action in equity for an accounting between co-partners, judgment can not be rendered for goods sold and delivered, nor can an accounting be had in an action simply for goods sold: *Short vs. Barry*, 3 Lansing, (N. Y.,) 143.

2. Where there is a public employment, from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned, is the doing something contrary to an agreement made in the course of such employment by the party, on whom such general duty is imposed: 20 Grattan, (Va.,) 264, *Express Co. vs. McVeigh*.

3. The holders of a bill of sale of a vessel, absolute on its face, though intended as a mortgage, may maintain an action for her conversion against a person claiming under a barratrous sale by the master; although on learning of the barratry, they abandon her to the insurers, and receive payment from them, as on a total loss: *Clark vs. Wilson*, 219; 103 Mass.

4. A person who had received goods from the owner, with the

right to use them, and to become owner of them on fulfillment of certain conditions, among which were, that he should not sell or remove them from a certain place without the owner's consent, and that they should not become his till paid for, sold them to a third person, who removed and sold them. *Held*, that the third person, was liable to the owner of the goods for their conversion, although he had acted in good faith, and had parted with them before any demand upon him: *Carter vs. Kingman*, 517; 103 Mass.

5. Where, by conveyances of water at a dam, a particular owner is entitled to a priority in the use of a specified *amount* of water; this must be held to imply that he is entitled to such a *head* of water as will enable him to make a beneficial use of that amount in propelling machinery: *Samuels vs. Blanchard*, 329; 25 Wis.

6. If, in such case, the head becomes so low that parties subsequent in right, by continuing to use the water, prevent such beneficial use by the party prior in right, they are liable as for a wrongful diversion: 329 Wis.

7. Where taxes have been illegally assessed, and collected by distress, for the use of a city, and paid into its treasury, and appropriated by it, the tax payer may recover the amount in an action at law against the city. *Phillips vs. City of Stephens' Point*, 594, 25 Wis.

8. In an action by A. against B. for a malicious prosecution, A. must show that B. brought his suit not only with malice, (*i. e.*, for a purpose not contemplated by the law in authorizing such a suit), but also, without probable cause: *Spain vs. Howe*, 625; 25 Wis.

9. An action for damages to plaintiff's premises by fire alleged to have caught, through defendant's negligence, from one kindled on his land, where the evidence showed that defendant's fire must have been communicated to plaintiffs' premises, (if at all,) by combustible material burning unobserved under ground, and there was no proof that defendant knew the combustible nature of the soil under the surface, or was guilty of negligence in ascertaining that fact, it was not error to grant a non-suit: *Case vs. Hobart*, 654; 25 Wis.

10. Defendants having cut timber from plaintiff's land in another State, and converted the timber to their own use; an action for the conversion, (but not for the trespass,) will lie against them in this State: *Tyson vs. McGuineas, et. al.*, 656; 25 Wis.

11. Tenant for life, who neglects to pay taxes which accrue *after*

his tenancy commences, is liable to an action for *waste*: *Phelan vs. Boylan*, 679; 25 Wis.

SEE LEASE, 1; LIMITATIONS, 4; FRAUDS, STATUTE OF, 1; HUSBAND AND WIFE, 6; PLEADING, 2; TRESPASS, 1, 3.

ACT OF GOD.—See *Common Carriers*, 2.

#### ADMINISTRATION.

1. An administrator in the year 1862, after receiving into his hands a sufficiency of assets to meet all unsettled claims against the estate, delivered over the remainder to the heirs at law; but in making the distribution, gave one share to Barbara Davis and her children, under a mistake of law, the fact being that it belonged to Barbara Davis alone, and the said Barbara made no objection at the time, but consented, under the same mistake of law, to the said distribution, but did nothing to mislead the administrator, who was not at all influenced by her consent. *Held*, 1st, The delivery of the assets to the children, who were not entitled, was, to that extent a *devastavit*, and Mrs. Davis is not estopped by her acts, from claiming of the administrator her rights as heir at law.

The effects delivered to the children, are still in contemplation of law in the hands of the administrator, to be accounted for not only to Mrs. Davis, but to any other person who has claims against the estate: *Davis vs. Bagley*, 40 Ga.

2. Sales by administrators when it is not otherwise provided by will, of any property of the estate except annual crops, carried to market, must be at public out-cry, to the highest bidder, and the purchaser is bound to see that the administrator is apparently proceeding under the prescribed forms: *Neal vs. Patten*, 40 Ga.

3. When there are no debts unpaid, and the administrator of an estate illegally disposes of property of the estate, and is insolvent, equity will entertain a bill filed by the heirs at law, to recover the property so illegally disposed of, or to decree an account of its proceeds: *S. W. R. R. Co. vs. Thomasson*, et al, 40 Ga.

ADVERSE POSSESSION.—See LAND TITLES, 2.

ADMISSIONS.—See ATTACHMENT, 3; PARTNERSHIP, 4; STATUTE OF LIMITATIONS, 1; EVIDENCE, 6, 7, 8.

#### AGENT.

1. An Agent as a tax collector, suing for commissions, must show as a condition necessary to a recovery, that he has fully performed

the duties of his agency: 2 Heiskell, (Tenn.,) *Mayor and Aldermen of Winchester vs. Slatter*, 65.

2. A principal can not ratify the act of an agent in part, and disaffirm it in part. A ratification as to part, operates as a confirmation of all: 2 Heiskell, (Tenn.,) *Wood vs. Cooper*, 441.

Payment to an agent, during the war, of the purchase money of land sold by the agent, under a power to sell on such terms as he might think best, in Southern bank notes, that being the best currency in circulation at that time, was a good payment: *Wood vs Cooper*, 2 Heiskell, (Tenn.,) 441.

4. An agent to whom a judgment was assigned for collection, receiving it in Confederate notes, and entering satisfaction on the docket, the payment was held to be good, in the absence of proof that the defendant had notice of the agency: *Dillard vs. Jared*, 2 Heiskell, 646.

5. Where a public officer loaned the School money of the State without authority of law, and took mortgages from the borrowers to secure such loans, it was held competent for the State to so far ratify the unauthorized acts, as to avail itself of and enforce the securities thus taken, not only as against the mortgagors, but as against subsequent purchasers and incumbrances: 28 Iowa, *The State vs. Shaw, et. al.*

6. The authority of an agent to contract for the sale of the lands of his principal may be established by parol evidence: *Rothman vs. Wasson*, 5 Kan., 552.

7. If money belonging to a bank is taken from its agent or collector by thieves or robbers, when he is using ordinary care and is guilty of no negligence, he is clearly not liable.

It is clearly the established rule of law, that an agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, whether reasonable or not, unless prevented by some unavoidable accident, without any default on his part, or unless the instructions require him to do an illegal or immoral act; and it is no defense, that he intended to act for the benefit of his principal. He is still responsible for loss occasioned by any violation of his duties, either in exceeding or disregarding instructions: *Rechtscherd vs. Accommodation Bank*, 47 Mo., 181.

8. Where an agent without the authority of his principal, borrows money and invests it in property, the principal, by afterwards appro-



priating and disposing of the property for his own benefit, will be held to ratify the act and become liable, and the measure of his liability, is the amount of money borrowed, and not that realized by the sale: *Watson vs. Bigelow*, 47 Mo., 412.

AGENCY.—See EXECUTOR, ETC., 4; HUSBAND AND WIFE, 11; INSURANCE, 1; RAILROADS, 4; SHERIFF, 1.

ALTERATION.—See BILLS AND NOTES, 18.

AMENDMENT.—See ANSWER.

#### ANSWER.

An answer filed to the original complaint will stand as an answer to the complaint as thereafter amended unless defendant answers anew. *It seems* that if defendant answers anew the amended complaint, his original answer is to be considered as abandoned, and may be stricken from the files, on motion: *Yates vs. French et al.*, 661; 25 Wis.

See CHANCERY PLEADING, 2.

#### APPEAL.

1. An equitable action (as one to avoid an administrator's deed) must be brought to this court by *appeal*, and not by writ of error: *Costello vs. Buch*, 477; 25 Wis.

2. Where proof of due service of summons by publication was allowed to be filed *nunc pro tunc*, after appeal taken by the defendant, he would be allowed to dismiss his appeal without costs: *Sueterlee vs. Sir*, 357; 25 Wis.

APPEAL BOND.—See ATTACHMENT, 6.

#### ASSESSMENT.

1. It is competent for the Legislature to authorize municipal corporations to assess the expense of local improvements upon property deemed to be particularly and specially benefited thereby in proportion to the benefit received. The Constitution does not expressly prohibit it, and there is nothing in the nature of the power of taxation inconsistent with it: *Hoyt vs. The City of East Suginaw*, 39; 19 Mich.

2. Where a statute provides that when a City Council shall decree an improvement necessary, they shall so declare by resolution, the declaration of the necessity for the improvement is a distinct preliminary act, which is indispensable to give the Council jurisdiction and without it the whole proceeding is a nullity: *Ib.*

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. A deed conveying real and personal property to a trustee for the benefit of creditors, does not require for its validity, an affidavit by the grantee that the consideration is true and *bona fide*: *Mackintosh vs. Corner et al.*, 33 Md., 598.

2. Where there is an assignment by a debtor for the benefit of his creditors generally, no particular creditor is concluded by taking under the assignment, from impeaching any of the debts attempted to be secured by it, and showing fraud and collusion in such of them as may stand in his way, and payment of which would operate to his prejudice: *Ib.*

3. But the fact that some of the preferred debts provided for in the assignment are fraudulent, and therefore void, does not render the assignment itself a nullity; it is still good as to all debts that are *bona fide*: *Ib.*

4. If the grantee of real estate mortgage it back to secure the purchase-money, and the mortgagee assign *bona fide* the mortgage to the wife of the mortgager, such assignment will not operate as a discharge of the mortgage: *Bean vs. Boothby*, 57 Me., 295.

5. And if, when the mortgage given back for the purchase-money of real estate is assigned *bona fide* to the wife of the mortgagor, the husband quit-claim to her, and she thereupon convey to a third person, by a deed of warranty, therein referring to the mortgage, "as having been cancelled by assignment," the mortgage will not thereby become merged, but it will be upheld: *Ib.*

6. A voluntary assignment in trust for creditors, which by its provisions, tends to hinder and delay creditors, and not assist them by distribution, is fraudulent and void in law. The law allows assignments for the benefit of creditors, but not to put property beyond their reach, and allows the preferring of creditors therein.

A voluntary assignment by an insolvent, in trust for his creditors, which reserves to the assignor any benefit or advantage out of the property conveyed to the injury of the creditors, renders the assignment void.

An assignment that is fraudulent in any of its provisions is void *in toto*, as against those entitled to take advantage of the fraud upon the principle that if a contract is void in part it is void altogether, but the same deed may contain several distinct contracts of conveyance, and then the fact that one contract is fraudulent, will not render void another contract which is legally distinct from it.

Neither the assignee nor the creditors are purchasers for value, and it is not necessary to bring a knowledge of a fraud in the assignment home to them, in order to render it void: *Kayser vs. Heavenrich*, 5 Kan., 324.

7. Where an assignee before maturity receives a promissory note, which discloses upon its face the fact that usurious interest is reserved, he is bound to take notice thereof, and will hold the note subject to that defense: *Hamill vs. Mason*, 51 Ills., 488.

8. Courts of law will recognize and protect the rights of the assignee of a *chose in action*, whether the assignment be good at law or in equity only. In equity, all contracts and agreements may be assigned, and the interest of the assignee will constitute a defense to a proceeding by garnishment: *Morris, Adm'r, vs. Cheney*, 51 Ills., 451.

9. Whatever assignment the payee of a note may make upon the same, he does not by such assignment, pass the legal bill to his assignee while it still remains in the hand of the payee or assignor: *Richards vs. Darst*, 51 Ills., 140.

10. The assignment of a mortgage by an indorsement thereon, without the assignment of the note secured by the mortgage, the mortgage not being an assignable instrument by indorsement, either at common law or by Statute, will not operate to pass the power of sale to the assignee, but it will still remain in the mortgagee: *Hamilton vs. Lubukee*, 415; 51 Ills.

See LIEN, 4; CONVEYANCE, 2.

#### ATTACHMENT.

1. The interest which the real owner has in a steamer, in his possession, may be attached, although another person has the record title as collateral security for a debt: *Perry vs. Somerby*, 57 Me., 552.

2. The delivery, by the attaching officer of property attached by him, to receiptors, and taking from them a written agreement, reciting the attachment, promising to return the property to the officer holding the execution within thirty days after judgment, and limiting their liability to a specific sum, does not dissolve the attachment: *Id.*

3. To sustain an attachment on the ground that the debtors were removing their property beyond the limits of the State to defraud their creditors, proof of the fact that one of the debtors admitted that the other, his partner, had absconded to another State and taken most of the means of the firm, leaving him to pay the debts, is alone sufficient. The fact, that he was aware of his partner's intention, and

made no effort to prevent him from taking the firm means, implies that it was done with his consent, and renders both guilty of the fraudulent act: *Bryant et al., vs. Simoneau*, 51 Ills., 324.

4. The lien on goods taken in attachment, is not destroyed by taking the same under a writ of replevin against the officer, nor by filing a replevin bond; it is only suspended during the pendency of the replevin suit: *Kayser vs. Bauer*, 5 Kan., 202.

5. The lien of an attachment at law which does not specify the property against which it issues, does not attach until levy, as against intermediate purchasers: *Vance vs. Cooper*, 2 Heiskell, (Tenn.,) 93.

6. Upon a decree in favor of an attaching creditor and an appeal therefrom, the appellant gives an appeal bond. The giving the bond does not release the attachment: *Magill vs. Sauer*, 20 Grat. Va., 540.

7. Personal property, exempt from liability to attachment, was attached on mesne process in an action against the owner, who then agreed in writing with the plaintiff that it might be sold by auction on a certain day; but by reason of a second attachment, the sale was postponed for several months, and until, the owner in the meanwhile having taken the benefit of the bankrupt act, it was prevented altogether by the claiming and taking of the property, by the assignee in bankruptcy, from the officer in whose custody it had remained without any notice from the owner that he claimed it as exempt from attachment. *Held*, that the owner must be deemed to have waived his privilege of exemption, and could not maintain an action against the officer for a conversion of the property: *Dow vs. Cheney*, 181, 103 Mass.

8. The liens of attaching creditors, under the law of Connecticut, regulating attachments on mesne process, take precedence in the order in which they are levied, and the first attaching creditor has sixty days in case of personal property, and four months in case of real estate, after final judgment, within which to perfect his lien and sequester the property in payment of his judgment debt: *Beers vs. Place*, 578, 36 Conn.

9. And each subsequent attaching creditor has the same periods of time respectively within which to levy his execution after the incumbrance of the next preceding attaching creditor is removed: *Id.*

10. A levy of an execution by a subsequent attaching creditor,

while the lien of a preceding attachment is pending on the property, is void. *Ib.*

See LANDLORD AND TENANT, 1.

#### BANK NOTES.

“Good current bank notes, are bank notes which circulate currently as money.” In the absence of proof, they are presumed to be at par, but subject to proof of their real value.

Upon a note executed after the act of Congress, for the issue of legal tender notes, the standard of comparison by which bank notes are to be estimated is legal tender notes, not gold and silver: *English vs. Turney*, 2 Heiskell, (Tenn.,) 617.

#### BANK.

1. A bank organized under the United States currency act as a National Bank, had failed to redeem its notes, and the Comptroller of the currency, under the provisions of the currency act, had appointed a receiver, who had taken possession of its assets, and its affairs were being wound up. A creditor presented a claim against the bank to the receiver, who disallowed it, and the creditor thereupon brought suit upon it against the bank. *Held*, that the proceedings of the Comptroller had not produced a forfeiture of the franchise of the bank and a dissolution of the corporation, and that therefore the suit would be against it: *Pahquioque Bank vs. Bethel Bank*, 325, 36 Conn.

2. Shares in National Banks located in this State, are subject to taxation by the State, although shares in the State Banks are not taxed *eo nomine*. The decision in *V n Slyke vs. the State*, (23 Wis., 655,) adhered to: *Bagnall vs. The State*, 112, 25 Wis.

3. Chapter 136, Laws of 1868, which provides “for the re-assessment and collection of delinquent taxes of 1865 and 1866, on the shares of National Banks in this State,” is valid: *Bagnall vs. The State*, 112, 25 Wis.

4. An averment that the rate of taxation upon plaintiff’s shares in a National Bank in this State, was greater than that assessed for “State Tax” upon other moneyed capital in the hands of individual citizens of the city in which plaintiff resided, *held* insufficient to show the tax illegal, it not appearing that such rate was greater than that imposed upon such other moneyed capital for State, County and municipal purposes. *Ib.*

S AGENT, 5.

BAR.—See ESTOPPEL, 12.

# BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In an action by the holders of certain promissory notes against an indorser who denied the genuineness of the indorsements, a deed of trust executed by the drawer of the notes, for the purpose of protecting and saving harmless the defendant as indorser, was held admissible as evidence of his ratification of the indorsements of such notes as corresponded with those described in the deed of trust. *Woodruff vs. Munroe*, 33 Md., 146.

2. A promise by an indorser to pay a draft subsequent to its dishonor, is presumptive evidence that the draft had been presented for payment in due time, and dishonored, and that he had received due notice thereof. This presumption, however, is one of fact for the jury, and not an absolute conclusion to be drawn by the Court. It is *prima facie* only, and liable to be rebutted. *Lewis Bros. vs. Brehme*, 33 Md., 412.

3. W. made and delivered sundry negotiable promissory notes, and, at the same time, to secure their payment, executed to the payee a mortgage upon real estate, which was duly recorded. The notes and mortgage came by indorsement to the hands of S., by whom they were surrendered to W., who gave him, in lieu thereof, a new note, secured by a mortgage upon other property. W. afterward, and before the maturity of the notes thus lifted, through the agency of D. & C., caused them again to be negotiated for value, to other parties, who received them in good faith, and without notice of prior transactions. The mortgage given to secure them remained uncanceled on record. W. afterward made and delivered to D. & C. sundry other negotiable notes, and to secure their payment gave a mortgage upon the premises covered by the first mortgage. A portion of these notes were subsequently assigned for value, to F. *Held*: 1. That, as against the holders and indorsers of the notes which had been re-negotiated, W. and his subsequent mortgagees were equitably estopped to claim that the lien of the first mortgage had been discharged by the transaction with S. 2. That the equitable lien held by F., under the last mortgage, must be postponed to that of the indorsers and holders of the notes secured by the first mortgage. *Jordan et al. vs. Forlong*, 19 (Critchfield,) Ohio, 89.

4. An action on a negotiable promissory note, indorsed by the payee in blank, may be brought in the name of any person who consents

thereto, although the note is the property of an insolvent bank in the hands of receivers. *Baker vs. Stenchfield*, 57 Me., 363.

5. A bill of exchange indorsed for accomodation, and delivered to the maker on the express condition that if it was not that day discounted by a particular bank, it was to be returned to the indorser or destroyed. Discount by that bank being refused, the bill was passed, with notice to the United States Marshal to pay executions, for the satisfaction of which the money was to be raised from the bank. *Held*, that there was no authority to so apply the bill. *Hickerson vs. Raiguel*, 2 Heiskell, (Tenn.,) 329.

6. A note for dollars, drawing interest from date, taken as a payment, is not presumed, in the absence of proof, to be taken at a discount, but at its nominal value. *Lancaster vs. Arendell*, 2 Heiskell, 434.

7. To charge the indorser of a promissory note, payable without interest, one day after sight, presentment to the maker and demand of payment must be made within a reasonable time after indorsement. The question of diligence in making presentment, etc., where there is no conflict of evidence, is a question of law.

The maker and indorser of a note in suit resided in the same city, and the payee three miles away. Several days after indorsement the payee was called out of the State, as a witness, and detained three weeks. The presentment, etc., was seventy-three days after the date of the indorsement. *Held*, that the indorser was discharged.—*Alexander vs. Parsons*, 3 Lansing, (N. Y.,) 333.

8. A draft signed by the secretary of an insurance company alone, is not binding on the company, where there was no evidence of any usage or law giving him authority to bind the company. *First National Bank of Kansas City vs. Hogan*, 47 Mo., 472.

9. It is no defense to an action on a promissory note, by an indorsee against the maker, that it was made without any consideration to the maker, or that it was understood between him and the payee, that the latter was to take care of it; and this, although the holder had, when he took the note, full notice of the circumstances under which it was made.—*Thatcher vs. W. R. Nat. Bank*, 19 Mich., 196.

10. A "waiver of notice" by an indorser will not be construed to extend beyond the import of the terms used, and hence constitutes no excuse for the want of due presentment of the note to the maker for payment.—*Voorhies vs. Atlee et al.*, 29 Iowa, 49, (Stiles). See, also, *Rhodes vs. Seymour*, 36 Conn., 1.



11. The obligations of a guarantor of a promissory note are, that he will pay the same if the maker fails to pay at maturity, and the holder shall use due diligence by suit to collect the same: *Ib.*

12. Due diligence, in the absence of special circumstances, would, upon the failure of the maker to pay, require suit to be instituted against him by the holder at the first regular term of court, in the defendant's venue, after maturity. It was accordingly *held*, that failure to bring such suit until after two terms had passed, showed such a want of diligence as that the warrantor was released: *Voorhies vs. Atlee et al.*, 29 Iowa, 49.

13. In order to defeat the rights of a *bona fide* holder for value, of a promissory note which it is claimed was procured by fraud, it must be shown, either directly or by circumstances, that he had *notice* of such infirmity. Proof of such fact and circumstances as would have put a reasonable man upon inquiry in relation thereto, are not sufficient; and an instruction to that effect was held erroneous: *Lake vs. Reed*, 29 Iowa, 258.

14. Where the holder of a promissory note, issued without a stamp, but afterwards stamped without authority, received it with notice of these facts, they may be properly pleaded against him as a defense in an action on the note. The case of *Blackwell vs. Denie*, 23 Iowa, 63, distinguished from the present one: *First National Bank of Centreville vs. Dougherty*, 29 Iowa, 260.

15. An instrument, payable "*in currency*," is not negotiable at common law, nor under the statute (Rev. S., § 1797,) unless it is manifest from the terms of the instrument that such was the intent of the parties. The use of the words "order" or "bearer" will not alone manifest such intent: Following *Rindskoff, Bros. & Co. vs. Barrett*, 11 Iowa, 172; *Huse vs. Humblin et al.*, 501, 29 Iowa.

16. Certificate of deposit in the following form: "Banking House of P. & S., Buffalo, February 20, 1869, J. McD. has deposited in this Bank \$1,947.68, payable to order of himself in currency, on the return of this certificate, with six per cent. interest if left over one month. (Signed) P. & S." *Held*, that the instrument was not negotiable. *Ib.*

17. Indorsers of non-negotiable instruments are liable to indorsees thereof, without demand upon the maker and notice of non-payment: *Ib.*

18. The alteration of a promissory note in a material respect by any one of several makers thereof, assuming to have authority so to

do, and for the honest purpose of making it conform to the original intention of the parties, without the express, though with the implied, assent of the holder, will not prevent a recovery by the latter against all the makers in an action declaring upon the note as though in the form originally delivered: *Murray vs. Graham et al.*, 520, 29 Iowa.

19. Where a negotiable note, and a mortgage securing it, given to a railroad company, were attached to its negotiable bond, which recited that they were transferred as security for, and should be transferrable only in connection with, the bond, this was an *indorsement* of the note, within the law merchant: *Crosby vs. Roub*, 16 Wis., 616, re-affirmed: *Bange vs. Flint*, 544, 25 Wis.

20. A promissory note was made and indorsed in blank in the State of New York, where it was payable. By the law of New York no agreement different from that which the law infers from a blank indorsement can be proved by parol. In a suit on the note against the indorser in this State, it was held that parol evidence of a special agreement, different from that implied by law, would be received: *Downer vs. Cheesebrough*, 39; 36 Conn.

BLANK INDORSEMENT.—See BILLS AND NOTES, 4; EVIDENCE, 2.

BOND.—See CONTRACT, 5; LIMITATIONS, 2.

### BROKER.

1. The order of a customer to a broker to buy stock, deliverable at any time, at buyer's option, in sixty days, does not authorize the broker to buy the stock himself at thirty days and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commission; and a usage of brokers to do so is bad; nor is the exchange of bought and sold notes between the broker and his customer, nor the giving of his notes by the customer in payment for the stock, in ignorance of the broker's conduct, a ratification of his acts: *Day vs. Holmes*, 306, 103 Mass.

2. A broker, employed to purchase stock, contracted for it in his own name with J. S., who owned it at the time but had made a prior contract for its sale. The employer, for groundless reasons, repudiated the contract; but the broker having no knowledge of or reason to suspect the prior sale by J. S., paid for the stock when tendered to him. *Hell*, that the Gen. Sts., c. 105, § 6, making void contracts for the sale of stocks not owned by the seller, did not debar the bro-

ker from recovering from his employer the amount so paid: *Brown vs. Phelps*, 313; 103 Mass.

3. The defendant in the month of March put into the hands of the plaintiff, a real estate broker, for sale, a house in a certain city street, at the price of \$6,500, the plaintiff to receive a commission of one per cent. if he sold the house, the defendant to have the right to sell it himself without being liable to a commission, and the plaintiff not to advertise. The plaintiff entered the house on his books and in December and January following advertised houses for sale on that street. G., who lived on the street and was desirous of finding a house near by for a friend, saw the advertisement and went to the plaintiff's office and learned that the defendant's house was for sale. He informed his friend, and the latter went to the defendant and negotiated with him for it and finally purchased it. The purchaser did not see the plaintiff nor go to his office, and G.'s action in the matter was wholly voluntary. *Held*, that the plaintiff was entitled to his commission: *Lincoln vs. McClutchie*, 136; 36 Conn.

CAVEAT EMPTOR.—See TRESPASS, 2.

#### CHAMPERTY.

An agreement between an attorney and client that the attorney shall receive as a contingent fee, a certain portion of the amount recovered against the other party, is not void as being champertous. The case of *Boardman & Brown vs. Thompson*, 25 Iowa; 487, distinguished from the present one: *McDonald vs. The Chicago & N. W. R. R. Co.*, 170; 29 Iowa, (Stiles.)

#### CHANCERY JURISDICTION.

1. Suit was brought on a bill against maker and indorser, and judgment by default, the indorser having no knowledge of an unauthorized disposition of the bill, and believing that it had passed according to the condition on which it was to be used. *Held*, suffi-

quity, there being no plea, demurrer or motion vs. *Raiguel*, 2 Heiskell, 329.

1 set aside a verdict and judgment of the issue *devisavit vel non* against a will, if it judgment were obtained by fraud. If, ready bee, probated in common form, probate: *Smith vs. Harrison*, 2 Heis-

## CHANCERY PLEADING.

1. A bill to enjoin a judgment at law, on the ground of newly discovered testimony, showing payment which should have been allowed on the debt, which states generally,—that complainant did not know that he could make this proof until after the judgment and adjournment of the court; that he used all diligence to get this proof, but did not succeed until after the trial, is not sufficient on demurrer, without stating the facts specifically: *Levan vs. Patton*, 2 Heiskell, (Tenn.,) 108.

2. Filing an answer in chancery is a waiver of objection to the jurisdiction of the court over the person of the defendant, as well as the subject matter of the bill: *Halcomb vs. Canady*, 2 Heiskell, (Tenn.,) 610.

## CHANCERY PRACTICE.

1. A sale of land, without redemption, ordered by a decree which does not show that the credit is allowed on application of the complainant is void, and will, on appeal taken after it is made and confirmed, be set aside, and a re-sale ordered: *Carter vs. Sims*, 2 Heiskell, (Tenn.,) 166.

2. A defendant in equity who has required the complainant to elect which of two suits he will proceed in, and has obtained a dismissal of a suit at law on such election, will not be allowed to object to the jurisdiction in equity: *McBroom vs. Wiley*, 2 Heiskell, (Tenn.,) 58.

## CHECK.

Where the defendant offered to pay an account to his creditor's agent in money, but at the latter's request gave him a check and the check was drawn on an individual bank, but a short distance away, in which the defendant had a sufficient deposit, and the bank paid drafts as presented, subsequently, on the same day, and during an hour on the morning of the day after when, being insolvent, it suspended, and the broker immediately made a general assignment, and fifteen days after was declared a bankrupt, and no presentation of the check was made at the bank or demand of payment on the banker, and the defendant had no notice of the non-payment until two weeks after delivery of the check, in an action by the principal counting on the check and also on the original indebtedness; *Held*, that the plaintiff could recover. The omission to present the check at the bank before its failure was not *laches*, nor was the omission to demand payment afterwards, unless loss or injury resulted therefrom,

to the defendant. And that any presumption of loss or injury was rebutted by proof of the defendant's knowledge of the insolvency, and of the notice to him of the non-payment of the check. *Held, further*, that the delivery of the check was not necessarily payment of the account, and the plaintiff was entitled to recover upon the original indebtedness; and that if the defendant relied upon the check to defeat a recovery, the *onus* was on him to show that through laches of the plaintiff in respect thereof injury or loss had resulted: *Syracuse R. R. Co. vs. Collins*, 3 Lansing, (N. Y.,) 29.

See ILLEGAL CONSIDERATION, 1.

CHOSE IN ACTION.—See ASSIGNMENT 8,.

#### CITY.

1. Where a city was authorized to build a harbor, issue its bonds for the price, and raise money by taxation to pay the interest and principal thereof, as they should become due, but, on its failure to issue the bonds, the contractor obtained a money judgment for the amount, and the city had no property on which execution could be levied: *Held*, that the city council had the power, and would be compelled by *mandamus*, to levy and collect a tax to pay such judgment. *State ex rel. Hasbrouck vs. Milwaukee*, 25 Wis., 122.

2. Whether a power in a municipal corporation to contract a debt necessarily carries with it the power to raise money by taxation for its payment, is not here decided. *Ib.*

3. An alternative *mandamus* may properly run to the Mayor and Common Council of a city by their titles of office, without any allegation or specification as to the names of the persons who hold the respective offices; and the peremptory writ, if granted, will run in like manner to the persons who then hold those offices. *Ib.*

COMMISSION.—See BROKER, 3.

#### COMMON CARRIER.

does not allege that the defendants acts set out constitute them such in an action against them as common

regarded as a common carrier, and  
very of the property entrusted to it,  
carrier. Where goods are deliver-  
l transported, and these parties are

expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers. *Southern Express Co. vs. McVeigh*, 20 Grat., (Va.,) 264.

2. The plaintiff shipped goods by a common carrier, whose route terminated at Albany, addressed to a consignee at New York, "by Union Express from Albany." He discovered after shipment, that the Express Company was wrongly named in the address, and applied to the carrier, who corrected the way-bill; the plaintiff's agent then gave an order for the goods, to the proper express company at Albany, and informed the carrier at Albany of the change; the latter promised to see to it and ship the goods on. The goods were placed by the carrier in a warehouse at Albany, on arrival there, and two days after were damaged there by an unusual and unexpected flood. *Held*, that the carrier was chargeable with the damage as a common carrier. *Held, further*, that the defendant could not claim exemption from liability, on the ground that the damage resulted from the act of God. *Dunson vs. New York Central R. R.*, 3 Lansing, (N. Y.,) 265.

See RAILROADS, 3.

#### CONFEDERATE CONTRACTS.

1. Confederate money is loaned and advanced by A. to B., and services are rendered during the war. These claims are to be ascertained by reducing the currency to its gold value at the time of the advance or loan, or service rendered. And the decree should be rendered in the legal currency of the United States for the equivalent at the time of the decree, of the amount of the gold so ascertained. *Magill vs. Manson*, 20 Grat., (Va.,) 527.

2. Where Confederate Treasury Notes were received when they had a value, and retained, without showing what became of them, the party will be held to account for the value of the notes. *Bogle vs. Hammons*, 2 Heiskell, (Tenn.,) 137.

3. A payment unlawfully made in Confederate money, used by the payee, will be allowed for at its marketable value at the time it was received. *Jackson vs. Collins*, 2 Heiskell, (Tenn.,) 491.

CONFEDERATE NOTES.—See AGENT, 4.

CONSIDERATION.—See CONTRACT, 1; BILLS AND NOTES, 9.

#### CONSTABLE.

1. An action can not be maintained upon a constable's official bond, on proof of a judgment against him in a suit for official misconduct,

2. To an action against a constable for breach of his official bond, a judgment in his favor in a former action on the bond for the same breach is not a bar, if it appears from the record that it may have been rendered for want of a sufficient demand upon him, which has since been made. *Ib.*

1. In the case of a railroad owned by a private corporation, in whose favor the right of eminent domain may be exercised, the *public use* consists in the right of the public to the carriage of persons and property upon tender of a proper consideration, and in the power of the State to control the franchise and limit the tolls. *Whiting vs. S. & F. R. R. Co.*, 25 Wis., 167.

3. Chapter 448, Private and Local Laws of 1867, which authorizes the supervisors of a county, (after an affirmative vote of the people of the county upon the question, and after certain portions of said company's road have been graded,) to issue county orders in aid of the road, and levy a tax to pay such orders, *the county not becoming a stockholder in the company: Held* invalid, as not a legitimate exercise of the taxing power. *Ib.*

## CONTRACT.

wager, by the terms of which all the  
f the parties. *Brown vs. Speyers*, 20

7, the price of a negro, signed by the  
to make a bill of sale at the time of  
money, evidently intended to bind the  
is the covenant of the vendee only.



If such covenant had been signed by both parties, it only bound the vendor to make the bill of sale when the money was paid, and so was not a dependent covenant. *Officer vs. Sims*, 2 Heiskell, (Tenn.,) 501.

4. The liability of the stayor is assumed in view of the existing law, and the issue of an execution before the end of the eight months in a case provided for by the law, is not a violation of the contract, but in conformity with it. *Rothchilds vs. Forbes*, 2 Heiskell, (Tenn.) 13.

5. When a bond is conditioned to convey land upon the payment of a note given for the purchase money, the vendor should tender a deed thereof, if he seeks to recover on the note. The obligations on the bond and on the note are mutually dependent. *Dietrich vs. Franz*, 47 Mo., 85.

6. A. being indebted to B. for the purchase of goods, sold them to C., who, in consideration of the sale from A. to himself, promised A. to pay his debt to B. *Held*, that the sale was a good consideration for the promise; that B. might sue C. upon it in his own name, and that the promise need not be in writing. *Flanagan vs. Hutchinson*, 47 Mo., 237.

7. No usage, however general and well understood, can be permitted to control the terms of a special contract, where its subject matter and terms are clear of doubt and obscurity. *Kimball vs. Bruwier*, 47 Mo., 398.

8. Delay in making payments upon a contract for the purchase of land after the time required, will not work a forfeiture of the vendee's right to specific performance, where partial payments have been subsequently received, and negotiations entered into to complete the purchase, and no notice of the vendor's intent to insist upon forfeiture for non-payment of arrears has been given. *Richmond vs. Foote*, 3 Lansing, (N. Y.,) 244.

9. An agreement to dispose of property by will in a particular way, if made on sufficient consideration, is valid and binding; and partial performance of a verbal contract of this description will take it out of the operation of the statute, when refusal to complete it would work a fraud upon the other party. *Gupton vs. Gupton*, 47 Mo., 37.

10. The law does not imply a promise to pay rent for the occupation of land under a contract of purchase ultimately consummated; and if there be no express promise on the part of the purchaser, an

action for use and occupation can not be maintained against him. *Deunett vs. Pen. Fair Grounds Co.*, 57 Me., 425.

11. Under an agreement to sell and convey land with a good title, the purchaser is not entitled to a warranty deed. *Kyle vs. Karanah*, 356, 103 Mass.

12. A., owning land in a city, signed and delivered to B., a writing, of which the following is the material part: "I hereby agree to let to B.," the land; "he agrees to pay \$400 per year, payable monthly," and do certain repairs; "I am to do all outside repairs; and at present to fence the yard, repair the cellar, and lay a water-pipe; and I will make a lease to B., of the premises for three, with a privilege of five years, from date." B. entered into possession immediately, and paid the rent named until ejected. The city afterwards, but within the term first named, took part of the land to widen a street. *Held*, that the writing was not a lease; and that B. could not maintain a bill in equity against the city to recover any portion of the damages assessed for the taking: *McGrath vs. Boston*, 369, 103 Mass.

13. Personal property bought and held by A., although bought with money furnished by and for which he has given his promissory notes to B., and held under an unrecorded agreement which provides that he shall hold the property in trust to secure payment of the notes, employ it in his business, and apply half of the proceeds of the business to pay the notes, and that on such payment the property shall belong three quarters to A., and one quarter to B., is subject to attachment as A.'s, individual property: *Huntington vs. Clemence*, 482, 103 Mass.

See PARTNERSHIP, 3; RAILROADS, 1, 2; SPECIFIC PERFORMANCE, 1; DURESS, 1; EVIDENCE, 3.

CONVERSION.—See ACTION, 3, 4, 10; ATTACHMENT, 7; TROVER, 2.

#### CONVEYANCE.

1. In the construction of a conveyance the intent of the parties is to prevail. Present words of conveyance in the former part of the instrument may be controlled by after portions of the same: *Kissom vs. Nelson*, 2 Heiskell, (Tenn.,) 4.

2. Assignment of a grant by indorsement and delivery, is not a mode of conveyance known to our law, and does not transfer the title legal or equitable, or give a right to a specific performance: *Holcomb vs. Canady*, 2 Heiskell, (Tenn.,) 610.

3. Where the facts touching the delivery of a deed are undisputed,

their legal effect is simply a question of law upon which the court may be required to pass: *Rogers vs. Carey*, 47 Mo., 232.

4. Recitals in a sheriff's deed are conclusive on the parties to the deed and those claiming under them: *Durette vs. Briggs*, 47 Mo., 356.

5. Conveyance to a railroad company in the following form: "Know all men by these presents, that we, Lewis Barlow and Ruth, his wife, of, etc., for the consideration of one dollar in hand paid by the M. & M. R. R. Co., do hereby grant and convey unto the said railroad company, the following piece or tract of land in Polk county, in the State of Iowa, and particularly described as follows: (here description given), to have and to hold the same unto the said railroad company forever; *provid*d, that, in case said company do not construct their road through said tract, or shall, after construction, abandon the route through said tract, the same shall revert to and become the property of the grantors. And the said Ruth hereby relinquishes her right of dower in the tract herein conveyed." It was contended that this was a deed in fee, and void, as such, for uncertainty of description. *Held*, that in view of the intention of the parties, as gathered from the language of the entire instrument, construed with reference to the situation of the parties and property, and applying the rule that a contract should be so construed as to uphold rather than defeat it, that the deed operated as a conveyance of a right of way, simply, and was, therefore, valid: *Barlow vs. The Chicago, Rock Island and Pacific R. R. Co.*, 276; 29 Iowa.

6. It was also *held* that the right of way in question was not forfeited or lost by a failure to occupy it for a period of thirteen years, growing out of delay in the construction of the road. The rule recognized, that mere non-user of an easement of this character, acquired by deed, will not operate to defeat or impair the right. *Ib.*

#### CORPORATION, MUNICIPAL.

1. Municipal corporations possess the powers granted to them in express terms and those necessarily involved in the enjoyment thereof. Doubts as to the possession of a power will be thrown against such possession: *Paine vs. Spratley*, 525 Kan., (5 Banks,).

2. The grant to a municipal corporation of the power to provide for the levy and collection of special taxes for the improvement of streets upon real estate adjacent, does not include the power to provide for the sale and conveyance of such real estate in case of non-payment. *Ib.*

3. A public square of a city is held by a corporation in trust for the public, and can not be sold on execution against the city for its general indebtedness: *Ranson vs. Boal*, 68, 29 Iowa.

4. The grant of an exclusive right, by city ordinance, to a street railway company to construct, operate and maintain over the streets of the city a street railway for the carriage of passengers, containing no provision in relation to the payment of any fee or license, does not exempt the company from paying a license fee provided by a prior ordinance to be paid by all persons engaged in conveying passengers: *The State for the use, etc., vs. Herod*, 123, 29 Iowa.

5. By a section of an ordinance of the city council of Des Moines it was ordained, "that the right to build and operate a railroad bridge on Market street over and across the Des Moines river, in the city of Des Moines, is hereby granted to the D. V. R. R. Co., provided said company build or cause to be built a railroad bridge across said river within five years." *Held*, 1, That the right to build and operate the bridge carried with it all the incidental rights and powers necessary to the efficacious enjoyment thereof, including the right to construct necessary and suitable approaches to the bridge. 2, That it was competent and within the rightful power of the city council to grant the rights conferred by the ordinance. 3, That the construction of the bridge and approaches being thus authorized, the railroad company were not liable for consequential damages resulting therefrom to a lot owner, in front of whose property an embankment had been thrown up in the proper construction of the bridge and approaches: *Slatten vs. The Des Moines Valley R. R. Co.*, 148, 29 Iowa.

6. Where a city, by its charter, is vested with control over its streets and alleys, with power to cause sidewalks to be paved, such powers are accompanied with the obligation on the part of the city to keep those (the improvement of which has been undertaken and thrown open to the public use) in such a state of repair as to be reasonably safe for persons traveling or passing over the same; and if an individual, without fault on his part, is injured by neglect or failure of the city in this respect, he may recover damages therefor against the city. But it *seems*, that for injuries resulting from an obstruction, or dangerous place, in a sidewalk, made or caused by an individual, the city would not be liable unless it had notice of the defect, and a reasonable time to remedy the same. Whether such notice to a tax-paying inhabitant of the city would be notice to the

city, under this rule, *quere?* *Rowell vs. Williams, et al.*, 210, 29 Iowa.

See BANK, 1.

#### COSTS.

On a bill in equity by an administrator for instructions whether, on a correct construction of the statute of distributions, a quarter of his intestate's estate should be divided among all the defendants or among some of them only, the costs of all parties as between solicitor and client, are to be paid out of that quarter: *Bigelow vs. Morong* 287, 103 Mass.

#### COVENANTS.

1. A covenant of warranty in a deed to the grantee, his heirs and assigns, runs with the land, and its benefits may be claimed by a remote grantee.

2. To recover upon a covenant of warranty, there must be an eviction or something equivalent thereto. Anciently, an actual eviction had to be shown; but the present and better doctrine is, that a technical eviction is not necessary,—but that the covenantee or his assigns may peaceably yield to a paramount title. The covenantee may make an effort himself to recover possession if it be adversely held, or if in possession he may await an action by his adversary, or, being able to show that his adversary has the superior title, may yield to it, and purchase it for his own protection, and then resort to his remedy on the covenant of warranty to him: *Claycomb vs. Munger*, 51 Ill., 373.

3. It is no release or discharge of a covenant against incumbrances contained in a deed because both parties knew at the time the deed was made that an incumbrance existed: *Beach vs. Miller*, 51 Ill., 206.

See CONTRACT, 3.

#### DAMAGES.

1. The damage and expense caused and incurred by removing, with that reasonable degree of care suited to the occasion, insured goods from an apparent imminent destruction by fire, are covered by a policy insuring against "loss or damage by fire," although the building in which they were insured, and from which they were thus removed, was not in fact burned: *White vs. Republic F. Ins. Co.*, 91, 57 Me.

2. The law will not apportion damages done, as by cattle to growing crops, where the negligence or carelessness of plaintiff and de-

fendant contributed equally to the injury: *Larkin vs. Taylor*, 433, 5 Kan., (Banks).

3. Where the property of one person is seized upon an execution against another, and sold, and the proceeds applied upon the debt, in an action of trespass—*de bonis asportatis*—by the owner of the property against the officer and plaintiff in the execution in the absence of malice or abuse of process, or a desire to do injury, the damages should be compensatory only. The mere fact that the property was taken against the repeated remonstrances of the owner, and his warning to the defendants that the property belonged to him, would not of itself show that the seizure and sale were malicious; and to instruct a jury that the existence of such fact is sufficient to authorize the finding of exemplary damages, would be erroneous: *Beveridge vs. Rawson*, 51 Ill., 504.

4. Exemplary or punitive damages are recoverable in an action of trespass against the person where injury was wantonly inflicted, and in such a suit the injured party may give in evidence such facts and circumstances accompanying the wrong as may have occasioned him special inconvenience and suffering: *Green vs. Craig*, 47 Mo., 90.

5. Where a contractor is prevented from completing his job by the unwarranted acts and default of the other party, he may sue either upon the contract and claim damages for a breach of it, or he may waive the contract and sue for the reasonable value of his work. He is not restricted to a *pro rata* share of the contract price: *McCullough vs. Baker*, 47 Mo., 401.

6. One person will not be allowed to impute a want of vigilance to another injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on his part: *Morrissey vs. Wiggins Ferry Co.*, 47 Mo., 521.

7. A servant who has been injured by the negligence, misfeasance or misconduct of a fellow servant, can maintain an action therefor against the master, where the servant, by whose negligence or misconduct the injury was occasioned, was not possessed of ordinary skill or capacity in the business entrusted to him, and the employment of such incompetent servant was attributable to the want of ordinary care upon the part of the master: *Harper vs. Indianapolis and St. Louis R. R. Co.*, 47 Mo., 567.

8. Where the defendant fired a pistol, the ball of which glanced and hit the plaintiff, and it was found that the injury was unintentional but was the result of gross and culpable carelessness on the

part of the defendant, it was held: 1. That trespass *vi et armis* would lie. 2. That the expense of the litigation might be considered in awarding damages to the plaintiff: *Welch vs. Durand*, 182, 36 Conn.

See HUSBAND AND WIFE, 2; MISTAKE, 1; OFFICERS, 2; RAILROADS, 3, 6; TRESPASS, 3.

### DEED.

1. After signing and acknowledging a deed of land, containing a covenant that the grantor or his executors or administrators should pay a sum of money to the grantee, the grantor delivered it to a third person for the grantee, and this person so received it from the grantor, and kept it till delivered by him to the grantee after the grantor's death, which occurred two days after the execution of the deed. *Held*, that the estate vested in the grantee, and the covenant became binding on the grantor, upon the delivery of the deed to the third person, although he was not employed by the grantee to receive it for him; and that the consideration of it was not open to inquiry: *Mather vs. Corliss*, 568, 103 Mass.

2. Stakes or other monuments fixed upon land platted as a town, showing the location and boundaries of the lots, and according to which purchasers have bought and taken possession, must govern as against the plat in a controversy between such purchasers; especially where it does not appear that a lot, interpolated upon the plat, has ever been sold by the proprietors, or that any one has ever taken actual possession of any specific part of the land as and for that lot: *Marsh vs. Mitchell*, 706, 25 Wis.

3. The presumption that a deed, duly executed and acknowledged, was delivered on the day of its date, is controlled by a presumption that it remained in the grantor's possession until the time at which the stamps thereon purport to have been cancelled by him.

Where the date written upon the revenue stamp is later than that of the deed, it will be presumed that the delivery was made at the time of the cancellation of the stamp: *Van Rensalaer vs. Vickory*, 3 Lansing, (N. Y.) 57.

4. On the conveyance of property in trust for creditors the presumption of acceptance arises, and the property vests in the trustee irrevocable by the grantor, to await the election of the beneficiaries: *Farquaharson vs. McDonald*, 2 Heiskell, (Tenn.) 405.

5. A distinct and unequivocal act of repudiation of a deed by a



beneficiary in it, will operate as an estoppel to claim a benefit under it. *Ibid.*

6. A deed conveying land, IN PRESENTI, to the heirs of a person living, vests the title in the children, then in ESSE, of that person; after born children do not take: *Grimes vs. Ormand*, 2 Heiskell, (Tenn.) 298.

7. A deed providing for the payment of all creditors, and disposing of the surplus to third persons, provides for debts only which existed at the making of the deed: *Vance vs. Smith*, 2 Heiskell, (Tenn.) 344.

See FRAUDULENT CONVEYANCE, 1; TAX AND TAX SALES, 2.

### DEFENSES.

Where an indorser proved as a defense, to an action against him on a note, that the payee had extended the time for payment without his consent, and that the consideration for the extension was an unfulfilled promise made by the maker to pay an usurious premium, therefore: *Held*, that the plaintiff (the holder of the note) might avail herself, in defense of the fact, that the extension was based upon no valid consideration: *Fernan vs. Doubleday*, 3 Lansing, (N. Y.,) 216.

### DELIVERY.

1. A delivery to a donee of a savings bank book, containing entries of deposit to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits: *Camp's Appeal from Probate*, 88; 36 Conn.

2. A delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser, is a sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. *Ib.*

3. And it seems that under the statute (Gen. Statutes, tit. 1, Sec. 64) which provides that the assignee of any chose in action may sue upon it in his own name, a delivery of such a chose in action would vest in the donee a legal title. *Ib.*

### DEMURRER.

The right to object to an erroneous ruling in sustaining a demurrer to a petition, is waived by pleading over. But where the question raised is a jurisdictional one, relating to the subject matter, this rule does not preclude the party pleading over from again rais-

ing it on appeal to the Supreme Court: *Roland vs. Brock*, 284; 29 Iowa. And see also, *Crawford vs. Wolf, Carpenter and Angle*, 567. *Ib.*

#### DESCENTS.

1. Lands descended from the father of an intestate who dies unmarried, without brothers and sisters, or the issue of such, will descend to the mother if living: *Towls vs. Rains*, 2 Heiskell, (Tenn.,) 355.

2. After born brothers and sisters, unless born within the period fixed by law, do not take an interest in the estate of a deceased brother: *Grimes vs. Orrand*, 2 Heiskell, (Tenn.,) 298.

DEVASTAVIT.—See ADMINISTRATION, 1.

#### DEVISE AND LEGACY.

A testator, having eight children, and three grandchildren, A. B. and C., children of a deceased daughter, and another grandchild, child of another deceased daughter, by his will divided his estate into ten equal parts, six of which he gave to six of his children by name; two to trustees for his other two children, one to A., B. and C., by name, and the tenth to the other grandchild. As to each of the shares given in trust, in event of the *cestui que trust* dying without issue, he directed that it should be divided among all his children and grandchildren, the issue of such of his children as should then have deceased, taking by representation their parents share, and, "to do equal and exact justice to all my children and grandchildren," he directed any advancements made to be deducted from the share of each child or grandchild. B. died before the testator. *Held*, that B's share did not lapse, but went to A. and C.: *Stedman vs. Priest*, 293, 103 Mass.

DILIGENCE.—See BILLS AND NOTES, 12.

#### DISSEISIN.

A grantor who has conveyed a good title by his deed of warranty, may, nevertheless, set up against his grantee and those holding that title, a title subsequently acquired by himself by disseisin of his original grantee or those holding under him: *Hines vs. Robinson*, 324, 57 Me.

#### DIVORCE.

1. A special statute of the State of Maine, authorizing the Supreme Judicial Court of that State, in its discretion, to decree a divorce between individuals named, is unconstitutional, as granting a

special indulgence by way of exemption from the general law: *Simonds vs. Simonds*, 572, 103 Mass.

2. Proof that a husband and his wife lived at the same time in this Commonwealth, but without co-habiting or having any communication with each other, is not proof that they "lived together as husband and wife" here, within the meaning of the Gen. Sts., c. 107, S. 12, specifying requirements of residence to give jurisdiction of libels for divorce: *Schrow vs. Schrow*, 574, 103 Mass.

#### DURESS.

1. Where personal fear is aroused by threats, so as to compel a person to make a contract, or to do any act, which he would not otherwise have done, such contract or act is utterly null and void: *Bogle vs. Hammons*, 2 Heiskell, (Tenn.,) 137.

2. Where a deed for land was obtained for Confederate treasury notes, during the war, by a substitute in the Confederate army, by repeated threats of bringing the soldiery upon the maker, there being a military order against refusals to take the notes, and by statements that the penalty of refusing was hanging, and by promises to take the money back, or make it good as gold and silver, if it did not answer all purposes, it was set aside for fraud and duress. *Ib.*, 136.

DYING DECLARATIONS.—See EVIDENCE, 5.

#### EJECTMENT.

In a bill to set aside a deed as fraudulent, the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in the plaintiff, and to eject the defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered, establishing plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to have a jury to pass upon the question of rents and profits, and upon other questions which arise in that form of action: *Magwire vs. Tyler*, 47 Mo., 115.

See TENANTS IN COMMON, 1.

#### ELECTION.

In the absence of any specific provision as to the jurisdiction of a contested election, a court having the power to induct an officer, has the power to determine the validity and truth of the return of his election. The County Court having the power to induct a Revenue

Collector, is the proper jurisdiction before which a contested election lies as to that office, there being no express provision for a contest elsewhere. If a party take an office under color of an election, the only remedy for the party really elected is by a contest: *Blackburn vs. Vick*, 2 Heiskell, (Tenn.,) 377.

#### EMINENT DOMAIN.

In assessing the damages occasioned by the taking of private property for public use, the advantages that may result to the owner on account of the improvement for which the property is taken, can not be considered: *Israel et al. vs. Jewett et al.*, 475, 29 Iowa.

EQUITABLE ACTION.—See APPEAL, 1.

#### ERROR.

1. Where there is error in the admission of evidence, or in the charge, it is not enough to avoid the reversal that there is sufficient evidence to support the verdict, aside from that which is objected to. It must appear that no injury could have been caused by the error: *Clark vs. Rhodes*, 2 Heiskell, (Tenn.,) 206.

2. A doubt as to the correctness of a verdict, does not authorize a reversal in the Supreme Court in a civil case, but it imposes upon the Court, more imperatively the duty of scrutinizing the incidents of the trial, and the other errors assigned in the record: *Hackett vs. Brown*, 2 Heiskell, (Tenn.,) 264.

3. It is error to submit an issue of *nul tiel record*, to a jury, but if they find as the Court would have found, it is not a material error, for which the Supreme Court will reverse: *Coffee vs. Neely*, 2 Heiskell, (Tenn.,) 304.

#### ESTOPPEL.

1. A party is estopped to deny the validity of a contract for the sale of chattels on which he has brought an action for the breach of a warranty contained in it, and obtained a judgment thereon. Such judgment affirms the validity of the contract, and by such judgment all facts necessarily within the issue, become, as between the same parties *res adjudicata*: *Barker vs. Cleveland*, 230; 19 Mich. (1 Clarke.)

2. To constitute a judgment in one case a bar to another action, it is not essential that the object of the two suits should be the same; nor that the parties should stand in the same relative position to each other, nor is it necessary that the point in controversy should have

been actually litigated in the first suit; it is sufficient if its determination was necessarily involved in the judgment: *Ib.*

3. An executor obtained an order for the sale of his testator's real estate, to satisfy liens thereon, and to pay legacies bequeathed by the will, and made a contract of sale under the order with the plaintiff's assignors. The heirs at law, who, as such, were entitled to the reversion after the expiration of a life estate devised to the widow, believed the order valid, verbally sanctioned the contract, and by their actions and conduct induced the plaintiffs to purchase under it; but after conveyance by the executor, they, as also the plaintiff, (who had improved the premises,) ascertained that the order was invalid, and refused to execute a deed of their interests. The plaintiff sued them to compel a conveyance, and had judgment, with costs. *Held*, that the defendants were estopped from disputing the agency of the executor in contracting for conveyance of their interests, and the judgment was affirmed: *Faril vs. Roberts*, 3 Lansing, (N. Y.,) 14.

See EXECUTOR, etc., 1; MORTGAGE, 4, 5; SET-OFF, 1; TOWN PLAT, 2; BILLS AND NOTES, 3; DEED, 5.

EVICTION.—See COVENANTS, 2.

### EVIDENCE.

1. To render admissible a deposition taken in a previous cause between the same parties, in relation to the same subject matter, no prior notice to the opposite party that it would be introduced, is necessary: *Shaul vs. Brown*, 28 Iowa, 37.

2. It is competent for one who has indorsed a negotiable promissory note in blank, in a suit brought against him by his immediate indorsee, to show in defense that he indorsed the note merely to pass the title, and that the understanding between the parties was, that the defendant's indorsement was made solely for the purpose of transferring the note, and that he assumed no liability, conditional or otherwise, thereby: *Patton vs. Pearson*, 57 Me., 428.

3. Testimony can not be received, upon the part of the defendant, to change, alter or vary a written contract, signed by the plaintiff, though it is not the contract upon which the action is founded: *Boody vs. Goddard*, 57 Me., 602.

4. An affidavit for an attachment by the indorser of a bill of exchange, wherein it is stated that the steps necessary to fix his liability as such indorser have been taken, is competent testimony in a suit

against him on such bill of exchange, to show that he was duly and legally notified of the dishonor of the bill: *Ryan vs. Farmer's Bank of Mo.*, 5 Kan., 658.

5. The doctrine permitting dying declarations, as such, to be given in evidence, applies exclusively to criminal prosecutions for felonious homicide, and has no reference to civil cases. But in civil cases, declarations of dying persons are sometimes admitted on a different principle. A declaration in regard to the cause of death, growing directly out of, and made immediately after the happening of the fatal event, would be admissible as constituting a part of the *res gestæ*: *Brownell vs. Pacific R. R. Co.*, 47 Mo., 239.

6. Admissions made by a grantor in a deed, or an assignor in an assignment, after making the deed or assignment, are not competent evidence against the grantee or assignee. However, when a common purpose is shown in the assignor and assignee to defraud the creditors of the assignee, the rule is different: *Weinrich vs. Porter*, 47 Mo., 293.

7. The declarations or admissions made by one while in possession of property, explanatory of his possession, as that he holds it in his own right, or as a tenant or trustee of another, are admissible in evidence, because they explain the character of the possession, and also as a part of the *res gestæ*: *Thomas vs. Wheeler*, 47 Mo., 363.

8. A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them, and concerning a matter upon which they are called upon to act, and which is within the scope of the authority usually exercised by them, are evidence against the corporation: *Northrup vs. Miss. Valley Ins. Co.*, 47 Mo., 535.

9. Oral testimony will not legitimately establish a proposition of fact which can not, by any mode of interpretation, be deduced from the words themselves when written, whatever may have been the appearance, look, manner, mode of answering, emphasis, accents, and gesticulations of the witnesses: *Markley vs. Mutual Benefit Ins. Co.*, 103 Mass., 78.

10. In an action on a promissory note, in which a discharge in insolvency is pleaded, and no replication is ordered by the court, the plaintiff may prove a new promise without having alleged it: *Cook vs. Shearman*, 21, *Ib.*

11. The rule of the statute (Rev., S., § 3982,) which prohibits a party from testifying where the adverse party is the executor of a deceased

person, does not apply to the *wife* of the claimant; and she is competent, under the statute, to give evidence sustaining his claim against the estate: *Shafer vs Dean, Adm'r*, 29 Iowa, 144.

12. The credibility of a witness can not be impeached by proof of contradictory statements, unless the proper foundation therefor is laid by first asking the witness in respect thereto, and to the time and place thereof: *Williamson vs. Peel, Ib.*, 458.

13. Nor will an exception be made to the rule where an affidavit for a continuance has been filed on the ground of the absence of a witness, and the opposite party, for the purpose of proceeding to trial, admits that the witness, if present, would testify to the facts alleged in the affidavit. It was accordingly *held*, that evidence that the absent witness had made a statement contradictory to the facts alleged in the affidavit, was not admissible for the purpose of impeachment. *Ib.*

14. Where, pending an action, the defendant died, and his administrator was substituted, it was *held*, that the deposition of plaintiff, taken in the action before the death of the decedent, was not admissible in behalf of the plaintiff, in view of section 3982 of the Revision, which prohibits a party from testifying where the adverse party is the executor or administrator of a deceased person: *Quick vs. Brooks, Adm'r*, 29 Iowa, 484.

15. Upon the trial of an action to recover a balance claimed, the plaintiff swore that the defendant, at the time of making a payment, had said and admitted that there was a balance due. The defendant testified as to the conversation, and his version of it contradicted the plaintiff as to the admission. He was asked if, at the time he made the payment, he admitted that there was a balance due. The question being objected to as leading, was excluded. *Held*, that the defendant was entitled to the benefit of his positive and unequivocal denial of the admission, and that the exclusion of the question, under the objection made, was error: *Potter vs. Bissell*, 3 Lansing, (N. Y.,) 205.

16. Other writings than the one sued on can not be introduced in evidence for the purpose of comparison of handwriting by the jury, or by the witnesses: *Clark vs. Rhodes*, 2 Heiskell, (Tenn.,) 206.

17. A constable's receipt to a surety for moneys due upon a judgment, is not evidence of its payment, as against a purchaser from the principal judgment debtor, or, it seems, against the debtor himself. *Brevard vs. Summar*, 2 Heiskell, (Tenn.,) 97.



18. The admission of secondary evidence is a preliminary matter for the Judge. It may be allowed, upon a reasonable presumption that the primary evidence is lost: *Anderson vs. Maberry*, 2 Heiskell, (Tenn.,) 653.

19. A witness may be shown to be incompetent for want of religious belief, either by an examination on *voir dire*, or by proof of his declarations on the subject, at the option of the party seeking to exclude him. *Ib.*

20. Declarations of the maker, or of the trustee of a deed, prejudicial to its validity, made subsequent to the execution of the deed, are inadmissible in evidence to affect the beneficiaries in the deed: *Vance vs. Smith*, 2 Heiskell, (Tenn.,) 344.

21. A witness can not be impeached by showing trivial discrepancies as to collateral matters, nor by proving that others were present and did not hear what he states to have been said, nor by loose conversation seemingly at variance with his evidence, to which his attention has not been properly called: *Bogle vs. Hammons*, 2 Heiskell, (Tenn.,) 137.

22. On a question as to whether a certain payment was made, it is admissible for the payor to prove that he had the means to pay, as a circumstance, as that he sold certain property to raise the money to pay the particular debt: *Planter's Bank vs. Massey*, 2 Heiskell, (Tenn.,) 360.

23. Congress has no power to prescribe rules of evidence in the State courts; and therefore, the act of Congress which declares that certain instruments shall not be received as evidence in any court, unless stamped as required by the Act, is to be understood as applicable only to the courts of the United States: *Clement vs. Conrad*, 19 Mich., 170.

See HUSBAND AND WIFE, 1; JUDGMENT, 1; LEASE, 1; WILLS, 2; BILLS AND NOTES, 1.

#### EXECUTOR AND ADMINISTRATOR.

1. A sale made by a person as executor, when he has not proved the will, or qualified as executor and given bond, he withholding the facts fraudulently is void: *McLean vs. Houston*, 2 Heiskell, (Tennessee,) 37.

2. It is the duty of an executor to propound the will and sustain it, or relinquish his trust. If it be contested, it is his duty to defend it by counsel and by proof. If he combine with the contestants to defeat the will, it is a breach of trust upon his part; and a verdict

and judgment against the will thus obtained, are fraudulent and void: *Smith vs. Harrison*, 2 Heiskell, (Tenn.,) 230.

3 A resident of another State, having insured his life with an insurance company chartered here, by a policy payable to himself, his representatives or assigns, and conditioned to be void if assigned without consent of the insurers, delivered it to a creditor here residing, as a pledge for the debt, and died, leaving the debt unpaid. An administrator of the estate was appointed in the State of his residence; and afterwards the creditor was appointed ancillary administrator here. The principal administrator then sued the insurers on the policy in the place of the domicil of the assured, and their agent duly accepted service of the summons in the suit, and of an injunction not to pay the policy to the creditor, under a statute requiring such acceptance of service. The creditor as ancillary administrator, afterwards brought a suit on the policy against the insurers here, in which they admitted their liability and willingness to pay the policy to the person entitled. *Held*, that the right of the plaintiff in the second suit, representing the equitable interest and right of immediate possession and control of the pledge as well as legal capacity to sue, was superior to that of the principal administrator, and that the pendency of the first suit was no bar to the maintenance of the second suit: *Merrill vs. New England Insurance Co.*, 245, 103 Mass.

4. Executors are agents or trustees only, whose duty it is to administer according to the will of the testator, and according to law, and not to subject the estate by their admissions: *Rhodes vs. Seymour*, 1, 36 Conn.

5. Therefore, where the defendant, the executor of an accommodation guarantor of a promissory note, after its maturity waived the exercise of diligence by the holder against the makers, and promised to pay the note out of the estate: *Held*, that such waiver and promise were a breach of his duty and in excess of his power, and were inoperative to bind him as executor. *Ib.*

6. And held that it made no difference that the executor was himself the sole legatee and devisee under the will, it not appearing that creditors might not be injured; and the act itself as an official act being unlawful and inoperative. *Ib.*

See MISTAKE, 3; EVIDENCE, 14.

EXTENSION OF TIME.—See DEFENSES.

FEME COVERT.—See TOWN PLAT, 2.

FORECLOSURE.—See MORTGAGE, 4, 7.

#### FORMER ADJUDICATION.

1. A judgment against a county, or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name. *Clark vs. Wolf et al.*, 197, 29 Iowa.

2. The holding, in *ex parte Holman et al.*, 28 Iowa, 88, that where a Federal Court for a State has decided that certain prior proceedings of a State court, pleaded as a defense and as depriving the Federal Court of jurisdiction, are ineffectual for that purpose, such decision is conclusive, and can not be collaterally impeached, followed in the present case. *Ib.*

#### FRAUD.

1. Where two or more *bona fide* creditors are engaged in a race for priority, the one securing it by a mortgage to him from the debtor, can not have his right defeated by, or postponed to, a more tardy or less fortunate creditor, by showing a fraudulent intent on the part of the debtor in making such mortgage, and knowledge of such intent on the part of the creditor. Fraud in its legal sense, can not without more, be predicated upon such a transaction: *Chase, Merrill & Blanchard vs. Walters* 460, 28 Iowa, (Stiles.)

2. Where the plaintiff in a suit at law knowing that his note was a forgery as to one defendant, yet permitted the other defendants to withdraw the pleas, and took judgment by default in the absence of the defendant whose name was forged, it was held to be a fraud in obtaining the judgment, such as would entitle the injured defendant to set aside the judgment by bill in equity: *Rowland vs. Jones*, 2 Heiskell, (Tenn.,) 321.

See EXECUTOR, ETC., 1, 2; TRUSTS, 2; ASSIGNMENT, 2, 3, 6; CHANCERY JURISDICTION, 2; CONTRACTS, 9.

#### FRAUDULENT CONVEYANCE.

1. The retention by the maker of a trust-deed of the possession of a dwelling-house conveyed for a time before foreclosure, is not inconsistent with the terms of a deed of trust to secure the payment of debts.

An exception of such articles as are exempt from execution out of

the operation of a deed does not affect the validity of the deed, further than to prevent the passing of the title to the property of like character with that reserved, until the separation of those reserved from those conveyed: *Farquaharson vs. McDonald*, 2 Heiskell, (Tenn.,) 404.

2. A deed can not be attacked by parol proof to show that it was intended to delay creditors, for the payment of whom it provides on its face.

A strong presumption of the fairness of a deed is raised by the subsequent settlement of the claims; in fraud of which it is charged to be made: *Vance vs. Smith*, 2 Heiskell, (Tenn.,) 343.

3. Where a vendor conveys property with the intent of defrauding his creditors, and such fraudulent intent is participated in by the vendee, his title to the property will not be protected, notwithstanding he paid a sufficient consideration therefor: *Chapel, Ecker & Dowley, et al. vs. Clapp et al.*, 191, 29 Iowa.

#### FRAUDS, STATUTE OF.

1. The provision that no action shall be brought to charge any person upon the promise to answer for the debt of another, unless it is made in writing, is construed to apply to promises made to the creditor, and hence it is always held that while the creditor can not recover upon a collateral parol agreement made with him to pay his debtor's obligations, yet if such agreement be not made with the creditor it can be enforced, if otherwise good, though not evidenced by any note or memorandum of writing: *Brown vs. Brown*, 47 Mo., 130.

2. An agreement to pay and discharge a debt, made with the debtor, or some persons interested for him, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or the spirit of the statute. *Ibid.*

3. An oral promise to make a will of all the testator's property, real and personal, in favor of a person who in consideration thereof, agrees to make a similar will in favor of the first testator and makes one accordingly, is a contract for the sale of lands, within the statute of frauds: Gen. Sts., c. 105 § 81: *Gould vs. Mansfield*, 408, 103 Mass.

See LAND TITLES, 1.

GIFT.—See HUSBAND AND WIFE, 12; TOWN PLAT, 1;

DELIVERY, 1, 2, 3.

## GUARDIAN AND WARD.

1. A. was appointed guardian of several minor heirs, and executed bonds as such with different sureties in each bond, to whom A. mortgaged property to indemnify them. A large amount of property belonging to the wards came into the hands of the guardian. He was removed from the guardianship without making final settlement, and a successor appointed. No order was made by the probate court that he pay over to his successor. The heirs united in a bill in chancery against the sureties. *Held*, that no equitable jurisdiction was shown to exist upon which a decree could be rendered against the guardian nor against his sureties. That there was no legal liability on the guardian to pay to his successor until an order on him by the probate court; and until he made default no liability to pay rested on his sureties. That the heirs could not jointly sue, nor the sureties in the several bonds be jointly sued nor held liable beyond their several bonds. That the remedy of the heirs (being of age) was severally on each bond at law: *Norton vs. Miller*, 25 Ark., 108.

2. The sureties of a general guardian are liable on the ordinary bond for money, proceeds of real estate converted by decree before the execution of the bond: *McClendon vs. Harlan*, 2 Heiskell, (Tenn.,) 337.

See HUSBAND AND WIFE, 10.

HANDWRITING.—See EVIDENCE, 16.

HEIRS-AT-LAW.—See ADMINISTRATION, 3.

## HIGHWAY.

1. In order to establish a highway by dedication, as against the public, where damages are sought on account of defects therein, it is necessary to show, not only that which in law will amount to a dedication on the part of the owner of the soil, but also the acceptance of the highway, as such by the public: *Manderschid vs. The City of Dubuque*, 73, 29 Iowa.

2. The circumstances which have been held sufficient to justify the inference of acceptance by the public in the different States, instanced, and the authorities collated by Beck, J. *Ib.*

## HUSBAND AND WIFE.

1. A wife is a competent witness, though her husband be a party, but she can not give evidence of any fact which she acquired by virtue of the confidential relations existing between her husband and herself: *McIntyre vs. Meldrin*, 40 Ga., 490.

2. Where a wife owns an undivided interest in common with her husband, in lands over which a public highway is laid out, she is entitled to receive a written previous notice of the hearing and to an award of damages in proportion to her interest: *Whitcher vs. Benton*, 48 New Hamp., 157.

3. Personal property of the wife may be taken in execution against the husband, where no notice of the wife's ownership, as provided by statute, has been filed for record, nor notice of any kind given until after the debt was contracted. Notice of the wife's claim to the officer at the time of the levy is not sufficient: *Williams vs. Brown*, 28 Iowa, 247.

4. In an action to charge the separate estate of a married woman for goods sold her, the insolvency of the husband may be shown in order to prove to whom credit was given and whether the goods were necessities adapted to the condition of the wife.

In a suit to charge the separate property of a married woman for goods sold her, it appeared that she was introduced to the plaintiff as a woman of wealth, and before the debt sued on was contracted, purchased several bills in her own name which were paid on presentation. The bill in suit she promised to pay several times. Her own testimony showed that she did not intend to charge her separate estate, but her husband's, but that what she bought were necessities adapted to her condition in life. *Held*, that as she made the contract for herself, in her own name, and on her own credit, the law will presume that she intended to charge her separate estate, notwithstanding her testimony to a contrary intent: *Miller vs. Brown*, 47 Mo., 504.

5. At the trial of a married woman for an assault committed in the immediate presence of her husband, the defendant asked the judge to instruct the jury that she was presumed to act under her husband's control; but the judge refused, and instructed them that, if they were satisfied that she did the acts proved, of her own free will, and without the aid or influence of her husband, they would find her guilty. *Held*, that the refusal to give the instruction was error. *Commonwealth vs. Eagan*, 71,

married woman, if not earned in a business, and separate account, nor given to her by her as against her husband's rep- and if she has mixed it with her own

separate funds so that the amount of it can not be ascertained, and deposited the whole in a savings bank, from which her husband's representatives have demanded the deposit, she can not maintain an action against the bank for the amount thereof: *McCluskey vs. Provident Institution for Savings*, 300, 103 Mass. .

7. A wife permitting her personalty to go into the hands of her husband, without any stipulation as to investment, has no claim to land purchased with the fund by the husband in his own name.

8. If the money is obtained by the husband by a privy examination of the wife during infancy, and she permits it to remain with the husband after she comes of age and to be used by him, the result will be the same: *Jennings vs. Jennings*, 2 Heiskell, (Tenn.,) 283.

9. By marriage with a female guardian, the husband becomes responsible for all sums for which she is then responsible, and for all that she becomes liable for during the coverture.

10. If she continues to act as guardian during coverture, he is responsible whether it be proper for her so to continue to act or not: *Allen vs. McCullough*, 2 Heiskell, (Tenn.,) 174.

11. Proof that the husband bargained for real property conveyed to and paid for by the wife, and also for a re-sale of the same by her does not establish his general agency for the wife respecting such property, nor show authority in him from the wife to improve it for her.

The wife is not charged at law for improvements made to her separate estate under the husband's contract therefor: *Ainsley vs. Mead*, 3 Lansing, (N. Y.,) 116.

12. A wife at the time of her marriage, owned certain bank stock. Sometime after the marriage the husband and wife went together to the bank and in his presence the stock was transferred on the books of the bank from her maiden to her married name. Held to constitute an abandonment by the husband of his interest in the stock and a gift of it to her: *Mason vs. Fuller*, 160, 36 Conn.

#### ILLEGAL CONSIDERATION.

The statute (General Statutes, tit. 28, sec. 1,) provides that all contracts of which the consideration is in whole or part money won at a horse-race, shall be utterly void. A. and B. agreed to race their horses for a purse of \$500, each to put half that amount into the hands of the defendant as a stakeholder, and the whole to belong to the winner.

Each deposited \$250 with the defendant, and he deposited in the bank \$125 in bills received by him of B., the same being placed to



his credit in bank with his other private funds. B. won the race and demanded the \$500 of the defendant. A. forbade the payment, but the defendant delivered to B. the money in his hands, \$375, and gave him his own check on the bank for \$125, payable to bearer. *Held*, that the plaintiff, to whom B. transferred the defendant's check for a valuable consideration, could not recover upon the check: *Conklin vs. Roberts*, 36 Conn., 461.

IMPROVEMENTS.—See EMINENT DOMAIN; LIEN, 9.

INCUMBRANCE.—See COVENANTS, 3.

INDORSEMENT.—See BILLS AND NOTES, 19, 20.

#### INNKEEPER.

The mere posting in the room of a guest a notice limiting the liability of the innkeeper for losses by theft, unless certain directions are observed, does not operate as notice to the guest of its contents; and it seems, that unless it be shown that the guest read it, or his attention was called to its contents, or that he wilfully avoided the learning the same, the liability of the innkeeper will not be affected thereby: *Bodwell vs. Bragg & Bro.*, 29 Iowa, 232.

#### INSURANCE.

Where an insurance company has an agent in another State upon whom service of suit can be made as required by the law of such State, it can not revoke the authority or representative character of such agent, (having no other such agent within the State,) and thus prevent the service, while it has contracts of insurance outstanding in such State: *Semmes vs. City Fire Ins. Co.*, 36 Conn., 543.

INSURANCE POLICY.—See EXECUTOR, 3.

INTENT.—See FRAUDULENT CONVEYANCE, 3; SALES, 1, 2.

INTENTION.—See CONVEYANCE, 1.

#### INTEREST.

1. If a note is made and indorsed to raise money, but is taken at a discount of 20 per cent., without notice of the fact that it is not a real transaction, the discount is not usurious: *Fraser vs. Sybert*, 2 Heiskell, (Tenn.,) 340.

2. The act of 1859–60, ch. 41, declares that an effort to take more than six per cent. interest for a debt which did not originate for money actually loaned, is unlawful, and shall not operate as a release

of the debtor from the entire amount of such debt, &c. This act, when applied to a note given for principal and usurious interest, computed on a debt, the origin of which was loaned money, does not operate to forfeit the original debt, but only the debt so far as it originates in the usury. The fourth section of the act makes an overcharge of interest only a forfeiture of the excess of interest: *Jackson vs. Collins*, 2 Heiskell, (Tenn.,) 491.

See PARTNERSHIP, 1.

#### JUDGMENT.

1. On the trial of *scire facias* to revive a dormant judgment, the defendant therein offered evidence to prove that the notes upon which the judgment was obtained were paid off before the rendition of the judgment—which evidence was rejected by the court. *Held*, that the evidence so offered, without more, was properly rejected: *Camp vs. Baker*, 40 Ga., 148.

2. When a motion is made to set aside a judgment on the ground that the party has a good defense at law, but in consequence of a misunderstanding between himself and his attorney the defense was not filed and judgment was taken by default; *Held* that this was not sufficient ground to set aside the judgment: *Kile vs. Lumpkin*, 40 Ga., 506.

3. Errors in a judgment, or proceedings supplementary thereto, approved by the court, can not be inquired into collaterally, where the record thereof on its face shows jurisdiction: *Paine vs. Spratley*, 5 Kan., 525.

4. Judgments rendered at the same term of the court, but on different days, do not relate to the first day of the term and become effective as of that date; they are liens on the real estate of the debtor, only from the dates at which they are respectively entered on the docket, and are entitled to priority accordingly: *Anderson vs. Tuck*, 33 Md., 225.

5. A judgment rendered on motion against a Revenue Collector, and against a part of living sureties only, is a nullity, and interposes no obstacle to a new proceeding; *Fry vs. Britton*, 2 Heiskell, (Tenn.,) 606.

6. If the levy and sale of the land of the debtor is not made within twelve months after judgment, its lien is lost, and a conveyance made while the lien subsists becomes good by relation: *Kelly vs. Thompson*, 2 Heiskell, (Tenn.,) 278.

7. The lien of a judgment obtained in February, 1861, was not extended beyond the time fixed by law, by reason of the war, or by the fact that process could not be issued or executed, but the lien expired in February, 1862, and a sale by the judgment debtor after that time, passed the title free from the creditor's claim: *Smart vs. Mason*, 2 Heiskell, (Tenn.,) 223.

See FORMER ADJUDICATION, 2; ACTION, 1; LIEN, 7.

JURISDICTION.—See FORMER ADJUDICATION, 2; GUARDIAN AND WARD, 1; JUDGMENT, 3.

LACHES.—See CHECK.

LANDLORD AND TENANT.—See LIEN, 2.

### LAND TITLES.

1. A verbal agreement, accompanied by possession and improvement, permanently locating a division line, is founded upon a good consideration, is not contrary to the Statute of Frauds, and will bind the parties and their privies. And one holding under a party to such an agreement may invoke it, although his deed of purchase by mistake prescribed a different line. The agreement would not be merged in or overruled by the deed: *Kincaid vs. Dorney*, 47 Mo., 337.

2. The presumption of law is, that possession of one tenant in common is the possession of the co-tenants. Hence, to establish the title of one co-tenant against another, there must be on his part, outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import, as to give notice to the co-tenants that an adverse possession and an actual disseisin are intended to be asserted against them: *Lapeyre vs. Paul*, 47 Mo., 586.

### LANDLORD AND TENANT.

Under an attachment on warrant and the order of the court thereon, certain goods and chattels of a tenant were seized and sold by the sheriff without paying the arrears of rent due the landlord. In an action against the sheriff by the landlord, *held* that the landlord having a quasi lien on the goods of his tenant subject to distress for arrearages of rent, was entitled to claim out of the proceeds of sale made by the sheriff such an amount of rent in arrear as he could have legally demanded if the goods had been taken on execution; and his claim, if properly established, would have taken prece-

dence of the debt for which attachment issued: *Thomson vs. Ball Steam Co.*, 33 Md., 312.

### LEASE.

Where two persons own land and one of them rents it by a written lease, he alone has the legal interest in the contract, and it is not admissible in evidence in a suit brought by the administrators of both owners—the contract being a chose in action passed at the death of the lessor to his administrator alone. If a written lease be made by two joint-owners of land, and one die, the right of action survives to the other, and on his death passes to his administrator, and not to the administrators of both: *Fesmire vs. Brock*, 20; 25 Ark.

See CONTRACTS, 12.



LIABILITY.—See PARTNERSHIP, 2.

### LIEN.

1. The *lien* of the landlord is a charge upon the crop for the payment of the rent, and accrues as soon as there is any crop upon which it may attach. It does not in any manner depend upon the maturity of the rent: *Sevier vs. Shaw, Barbour & Co.*, 417; 25 Ark.

2. A mortgage upon a crop for advances made to enable the tenant to make the crop, the mortgagee having notice of the existence of the tenancy, is subject to the *lien* of the landlord for rent. The landlord's lien for rent accrues as soon as there is any crop upon which it may attach: *Smith vs. Meyer*, 609, 25 Ark.

3. A stranger, or volunteer, paying the debt due to a vendor of real estate, having a lien for the purchase money, is not subrogated to the vendor's lien: *Nichol vs. Dunn*, 129; 25 Ark.

4. The mere *assignment* by the vendor of land of a note given for the purchase money of the land, *does not transfer* to the assignee the *vendor's lien*: *Simpson vs. Montgomery*, 365. *Ib.*

5. The execution of an absolute conveyance, with acknowledgment of the purchase money, is *not* a waiver. Neither is the taking of a covenant from the vendee a waiver: *Harris vs. Hanks*, 510. *Ib.*

6. The *lien* attaches if, under all the circumstances, there remains a *doubt* as to the intention to waive the lien, where other securities are accepted. *Prima facie*, real estate sold is subject to a *lien* for the unpaid purchase money: *Ib.* See also, *Wilson vs. Lyon*, 166; 51 Ill.

7. A confession of judgment for the sum of \$———, with in-

terest and costs of suit, is not sufficient to sustain a judgment, signed up for a specified sum as principal, with interest, etc., as the shape of the confession shows that the parties had not agreed upon the amount with which the blank was to be filled, or had, for some other reason, neglected to fill it; such judgment takes no lien on the property of the defendants; and an order of court, amending the confession by filling the blank with the sum for which the judgment had been signed, will not create a lien on property purchased from the defendants, *bona fide*, prior to the date of such order. The record in such case, was only notice of what it contained, and was not notice that there was any legal judgment against the defendants or any lien upon their property: *Lea vs. Yates*, 56, 40 Ga.

8. Judgments which were legal, valid, subsisting judgments at the time of the testator's or intestate's death, are to be paid according to their priority of lien at *that time*; and if such judgments should afterwards become dormant, and be revived before the assets of the estate shall have been distributed, such revived judgments will relate back, as to the order of payment, to the exact position which such judgments occupied at the death of the testator or intestate, and are to be paid according to the priority of lien as the same existed at *that time*: *King vs. Morris et al.*, 63, 40 Ga.

9. The purchaser of land, or of a lease subject to the lien of a judgment, can not claim improvements subsequently made by him, (though without actual knowledge of the judgment,) to be exempt from the lien thereof: *Cook vs. Kraft*, 3 Lansing, (N. Y.) 512.

10. The principle upon which an equitable lien is allowed priority over a judgment upon land, is, it seems, that the lien existed prior to the docketing of the judgment. *Ibid.*

See JUDGMENT, 6, 7; MORTGAGE, 4, 5, 6; SALES, 2; ATTACHMENT, 4, 5, 8, 9, 10.

#### LIMITATIONS—STATUTE OF.

1. To remove the bar of the Statute of Limitations which was pleaded in an action on a promissory note, it was shown that the attorney for the plaintiff had written to the defendant, calling her attention to the note, particularly describing it, and stating that the plaintiff as trustee, was compelled to take some action, either to have the claim liquidated or placed in such form as to avoid the Statute of Limitations. The defendant replied, expressing her regret that she could not remit the amount due, and stating the causes of her inability to do so. She at the same time, requested the plaintiff's attorney

to communicate with her agent, who had a power of attorney and the entire management of her estate, and would do all that her ruined condition would permit. *Held* to be a sufficient acknowledgment of a subsisting debt to remove the bar of the statute: *Buffington vs. Davis*, 33 Md., 511.

2. The Statute of Limitations (Code 2776) bars suits on a Sheriff's bond in ten years from the time the cause of action accrued. Where there is no return of an execution, the Statute of three years does not apply: *Wiseman vs. Bean*, 2 Heiskell, (Tenn.,) 390.

3. A payment and indorsement thereof on a promissory note will not prevent the bar of our Statute of Limitations: Following *Parsons vs. Carey*, 28 Iowa, 431; and *Harrencourt vs. Merritt*, 29 Ib., 71 *Roberts vs. Hammon*, 128, 29 Iowa.

4. While a claim held by the estate against an heir, which is barred by the Statute of Limitations, might, as it seems, be considered in settling his distributive share, yet if an action at law be commenced thereon for the purpose of enforcing the collection thereof, he may successfully plead the Statute of Limitations, notwithstanding the pendency of a proceeding in Chancery for the settlement of the estate and the distribution of the assets: *Garret (Receiver) vs. Pierson*, 304; 29 Iowa.

See TENANTS IN COMMON, 1.

MALICIOUS PROSECUTION.—See ACTION, 8.

MANDAMUS.—See CITY, 1, 3.

MASTER AND SERVANT.—See DAMAGES, 7.

#### MISTAKE.

1. Where lands intended to be conveyed are omitted from a deed, and it turns out that the vendor has no title, the vendee is entitled to recover for the value of the land not conveyed: *Frazier vs. Tubb*, 2 Heiskell, (Tenn.,) 662.

2. The Chancery Court is the appropriate jurisdiction to afford this relief, as a recovery of money paid under mistake. If not, the objection must be taken IN LIMINE, and is waived by answer. *Ibid.*

3. In such case, an executor who has made the sale is personally liable for the money received, and must look to the estate for his indemnity. That the estate is settled will not protect him. *Ibid.*

See ADMINISTRATION, 1.

#### MORTGAGES.

1. A mortgagee of personal property must see to it that the prop-

erty mortgaged is properly and truly described, so that others may not be misled. The description given in the mortgage must control, otherwise great fraud and injury might result: *Hutton vs. Arnett*, 198, 51 Ill.,

2. *Effect of notice.* The rule in regard to the effect of actual notice of an unrecorded deed of realty, has no application to the case of a chattel mortgage not legally executed and acknowledged: *Sage vs. Browning*, 217. *Ib.*

3. A chattel mortgage not acknowledged, is void, as against a junior mortgagee, notwithstanding he took with actual notice of the elder mortgage. *Ib.*

4. An action brought for a foreclosure of a first mortgage on real estate does not affect the rights of a junior mortgagee holding a second mortgage on the same premises; and if he is not made a party to such action, and the only rights acquired by the purchaser of the mortgaged premises at the sale under the decree in such action as against the second mortgagee, not a party thereto, is a right of a prior lien upon the premises to the extent of the money due and unpaid on the first mortgage, as if the mortgagee had assigned the mortgage to him without foreclosure. An action by the purchaser at the foreclosure sale under the first mortgage brought against junior incumbrancers, who were not parties to such action, to fore-  
n under the first mortgage, is, as to the  
e *de novo*.

ortgaged premises from the vendee at  
ig the pendency of the action brought  
junior incumbrancers, who were not  
gainst such junior incumbrancers, can  
were possessed by his grantor; and  
*pendente lite*, and claiming the benefit of  
he is bound by them as much as if he  
in the action: *Rogers vs. Holyoke*, 14

l sundry negotiable promissory notes,  
re their payment, executed to the payee  
, which was duly recorded. The notes  
ement to the hands of S., by whom  
, who gave him in lieu thereof a new  
upon other property. W. afterward,  
ie notes thus lifted, through the agency



of D. & C., caused them again to be negotiated, for value, to other parties who received them in good faith, and without notice of the prior transactions. The mortgage given to secure them remained uncanceled upon the record. W. afterward made and delivered to D. and C. sundry other negotiable notes, and to secure their payment gave a mortgage upon the premises covered by the first mortgage. A portion of these notes were subsequently assigned for value to F. *Held*: 1, That as against the holders and indorsers of the notes which had been re-negotiated, W. and his subsequent mortgagees were equitably estopped to claim that the lien of the first mortgage had been discharged by the transaction with S. 2, That the equitable lien held by F. under the last mortgage must be postponed to that of the indorsers and holders of the notes secured by the first mortgage: *Jordan et al. vs. Forlong*, 89, 19 Ohio, (Critchfield.)

6. A mortgage, which has not been acknowledged as prescribed by the statute, though irregularly recorded, creates no lien on the mortgaged property, as against creditors and subsequent purchasers, but is good as between the parties; and, on breach of the condition of payment, may be enforced against the mortgagor, and, on his death, against his administrator, in preference to his general creditors: *Haskill vs. Sevier*, 152, 25 Ark.

7. In a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passed to the mortgagee or trustee. And the addition of a power to sell without judicial proceedings to foreclose can not avoid the legal effect of the grant. The trustee, after dishonor of the trust notes, could enter, and, without sale or foreclosure, could maintain his possession for the use of the beneficiary not only against all outsiders, but against the maker of the deed himself, until the payment of the trust note: *Johnson vs. Houston*, 47 Mo., 227.

See ASSIGNMENT, 4, 5, 10.

MUNICIPAL CORPORATIONS.—See ASSESSMENT, 1, 2; CITY, 1, 2.

NECESSARIES.—See HUSBAND AND WIFE, 4.

#### NEGLIGENCE.

1. Where a railroad company contracts for the transportation of goods over other railroads forming with its own a continuous line, any stipulation in the contract, or notice to the other party, to the effect that the company will not be liable for losses or damage occasioned by negligence or fault while the goods are not upon its own road, is

against public policy and void, equally as in case of transportation exclusively upon its own road: *C., H. and D., and D. & M. R. R. Co., vs. Pontius and Richmond*, 221, 19 (Critchfield) O.

2. The rule must be considered as firmly established in this State, that in such cases, where the degree of negligence on the part of the plaintiff is slight, as compared with that of the defendant, he can recover: *Chicago & Alton R. R. Co. vs. Pondrom*, 333, 51 (Freeman) Ills.

3. Where a person traveling on a railroad car permits his arm to rest on the base of the window, and slightly project outside, and thereby has his arm broken in passing a freight train, the negligence of such person is slight compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and a recovery may be had for the injury sustained. *Ib.*, 333.

4. It is a gross negligence, on the part of a railway company, to permit cars or other heavy or permanent bodies, to stand so near its tracks that its trains in passing over them, must pass within a few inches of such bodies. *Ib.*, 333.

See ACTION, 9; DAMAGES, 2, 6, 7; OFFICERS, 1, 2; RAILROADS, 2; SHERIFF, 1.

#### NEW TRIAL.

Where the Court is of the opinion that the plaintiff failed to make out his case, yet, if the verdict may have been influenced by improper evidence for the defendant, a new trial will be ordered: *Evans vs. Pigg*, 28 Tex., 587.

NON USER.—See CONVEYANCE, 6.

NOTICE.—See HUSBAND AND WIFE, 3; INNKEEPER, 1; LIEN, 7; MORTGAGE, 1, 2, 3; NEGLIGENCE, 1; BILLS AND NOTES, 13, 14; CORPORATIONS, 6; EVIDENCE, 1, 4.

NUL TIEL RECORD.—See ERROR, 3.

#### OFFICERS.

1. When a United States Marshal takes property into his custody, under a process *in rem*, issued out of an admiralty Court, he becomes thenceforth chargeable with its safe keeping. It is his duty to use due diligence to keep the property safely, and he will be liable to the owner for any damage to the property resulting from a want of such diligence: *Jones vs. McGuirk*, 382, (Freeman's) 51 Ills.

2. So where a Marshal seized and took into his custody, under such a process, a steam tug, which he put in charge of a custodian, and while so situated the tug sprung a leak and sunk, for want of proper care and attention on the part of the custodian, it was held that the Marshal was liable to the owner for the damage occasioned thereby. The property being thus in the custody of the Marshal, the owner was relieved of all concern about it, and is not required to be present to protect it. The sole responsibility of its safe keeping is upon the officer. *Ib.*, 382.

#### PARTNERSHIP.

1. In a suit by a firm on an open account, the plaintiffs offered one partner of the firm as a witness to prove their account, who stated on his *voir dire*, that he was entitled to one-third of the profits of the business, but that he considered there were no profits; that he owed an account to the firm which he would have to pay if the other assets should be insufficient to pay the firm liabilities other than the capital invested, but that the other assets were sufficient for that purpose, and that he did not consider that he had any interest in the result of the suit; *Held*, that the objection of interest was well taken and was erroneously overruled: *Wade vs. Eckford*, 28 Tex., 520.

2. A member of the partnership, after dissolution thereof, is authorized to defend, in the name of the partnership, a suit against the firm, to appeal from the judgment, and to procure sureties on the appeal bond to that end. It is accordingly *held* that the members of the partnership are liable in such case, to a surety on the appeal bond, who is afterwards compelled to pay the judgment: *Gard vs. Clark*, 189, 29 Iowa.

3. To bind the firm by a contract, it is not necessary that it should have been signed by all the partners or in the firm name, if it was intended to bind the firm, was so excepted, and was in respect to the business thereof: *Barcroft, George & Co. vs. Haworth et al.*, 462, 29 Iowa.

4. The admission by one of two partners of the correctness of an account stated against the partnership is sufficient in a suit against the firm on such account even though for want of service the suit has been dismissed as to the partner making the admission: *Cady vs. Kyle*, 47 Mo., 346.

5. In a suit on a partnership account it appeared that A. and B.,

members of the firm, being about to trade with C., agreed with him verbally that payments by the firm should be first applied to satisfy a pre-existing debt owing by A. *Held*, that although the agreement might have been contrary to the Statute of Frauds, and therefore incapable of enforcement, yet if the parties went on and complied with its terms, and applied the payment to the old account, they could not repudiate it and afterward apply the payments to that of the firm: *Mueller vs. Wiebracht*, 47 Mo., 468.

PAYMENT.—See EVIDENCE, 22; LIMITATION, 3; PARTNERSHIP, 5; PLEADING, 2; AGENT, 3, 4.

### PLEADING.

1. In an action by three plaintiffs, who had been partners, to recover for partnership, goods which, after the dissolution of the firm, had been delivered to the defendant by one of the plaintiffs, without the knowledge of the others, in payment of his private debt, the declaration contained a count in tort for the conversion of the goods, and a count in contract for goods sold and delivered. The answer to the first count denied the conversion, as to the second alleged payment. *Held*, that the plaintiffs could not maintain the action, although the defendant had conspired with the plaintiff who delivered to him the goods to defraud the other plaintiffs: *Furley vs. Lovell*, 387, 103 Mass.

2. Where parties are declared against as joint makers of a promissory note, the production of a note signed at the foot by one, the name of the other appearing in blank on the back of the note, will *prima facie*, support the declaration; and in the absence of a sworn plea by the latter, denying the execution of the note by him as maker, or of some stipulation on the subject, he can not deny that he was a joint maker: *Lincoln vs. Hinzley*, 435; 51 (Freeman's) Ill.

POLICY OF INSURANCE.—See DEED, 3.

POWERS.—See CORPORATIONS, 1, 2, 5.

PRESUMPTION.—See DEED, 3; FRAUDULENT CONVEYANCE, 2; HUSBAND AND WIFE, 4, 5; SURETYSHIP, 1; BILLS AND NOTES, 2.

### PRINCIPAL AND AGENT.

An agent who has settled with his principal an account in which he has credited himself with the amount of a debt owed by the principal, as having been paid by himself to the creditor, is liable there-

for to the creditor on account, for money had and received: *Putnam vs. Field*, 556, 103 Mass.

See SURETYSHIP, 1; AGENT, 8.

PRIORITIES.—See FRAUD, 1; JUDGMENT, 4; LIEN, 8, 10; LANDLORD AND TENANT, 1.

PROMISSORY NOTES.—See PLEADING, 1.

PURCHASER.—See ADMINISTRATOR, 1.

### RAILROADS.

1. A railroad company having a claim for an unpaid subscription to its stock, has the power to sell it, or make a contract to dispose of it, for the purposes of the road, as much as to assign a promissory note. Such a corporation has the power to contract for the sale of any of its securities, *choses in action*, or assets, for the purposes of raising means to construct or equip its road, or to pay its indebtedness. But the power to sell such securities does not include the power to mortgage them. So the act of the legislature of Wisconsin in relation to the execution of mortgages by railroad companies, does not authorize such companies in that State, to mortgage their stock subscriptions as security for the payment of their bonds: *Morris, adm'r, et al. vs. Cheney*, 451, 51 (Freeman's) Ill.

2. In making a contract for the shipment of live-stock at a specified rate, a railroad company, without any additional consideration, delivered to the shipper a "drover's pass," entitling him to go with his stock, and to return on a passenger train. In the written agreement for transporting the stock the holder of the ticket was referred to as "riding free to take charge of the stock." On the pass was an indorsement that it was a "free ticket," and that the holder assumed all risk of accident, and agreed that the company should not be liable under any circumstances, whether of negligence by the company's agents, or otherwise, for any injury to his person or property; and that he would not consider the company as common carriers, or liable as such. *Held*, 1st, That the pass and the agreement for transporting the stock constituted together a single contract; and that the holder, both while going with his stock and returning, was not a gratuitous but a paying passenger. 2d, That the stipulation in the contract, exempting the company from liability for *negligence*, constituted no defense to an action brought by the shipper for personal injury caused by the negligence of the servants of the company in the manage-

ment of its trains, such stipulation being against the policy of the law, and therefore void: *C. P. & A. R. R. Co. vs. Curran*, 1, 19 (Critchfield) O.

3. A railroad company may become liable as common carrier, by contract for transportation of goods over other railroads forming with its own a continuous line: *C. H. & D., and D. & M. R. R. Co. vs. Portius & Richmond*, 221. *Ibid.*

Where it does so contract, any stipulation in the contract, or notice to the other party, to the effect that the company will not be liable for losses or damage occasioned by negligence or fault while the goods are not upon its own road, is against public policy and void, equally as in case of transportation exclusively upon its own road: *Ib.*, 221.

4. A bill of lading signed by the company's receiving agent, and accepted and acquiesced in by the consignor, is binding upon the latter, although not signed by him; and the terms and conditions of the contract expressed therein, can not be contradicted by parol proof. *Ib.*, 221.

5. Where a party delivers to a railroad company chattels to be transported from the point of delivery to another designated point on its line, and pays the charges for such transportation in advance, he has the right, as against the company, to resume the exclusive possession and control of his chattels before they have reached the destination named in the bill of lading, whenever and wherever he can do so without unreasonable interference with the business of the company. If he do thus resume exclusive possession and control of his chattels during the time within which the company might, without unreasonable delay, proceed in the performance of its contract of affreightment, and receive them in good order and condition, he thereby absolves the company from all further responsibility on account of them. *C. & P. R. R. Co. vs. Sargent*, *Ib.*, 438.

6. Where S., at New Philadelphia, Ohio, delivered to the Cleveland Company, a drove of horses to be by it, and by the terms of the bill of lading, who was a hired hand of S., and S., the driver of the horses, proceeding to Pittsburgh, he carried the horses, and S. not finding them on the forenoon of the next day Alleghany City, which is separated from the Ohio River, and where, for some reason not

appearing in the record, the horses had been deposited the night before by the servants of the company; and thereupon S., having and having had no communication whatsoever with any agent or representative of the company, directs B. & R. to keep and take care of the horses until his return, and then, without more, goes back to New Philadelphia, and takes the consignee named in the bill of lading, J., back with him; and before the return of S., the horses are destroyed in the stable of B. & R. by an accidental fire. *Held*, in an action by S. against the company to recover damages for the loss of the horses, and there being no evidence in the case tending to modify the substantial features of the case as here stated, and the jury having found a verdict in favor of S. for the value of the horses, and a motion having been made for a new trial on the ground that the verdict was not sustained by sufficient evidence, the Court erred in overruling that motion. *Ib.*, 438.

See NEGLIGENCE, 1, 4.

RATIFICATION.—See AGENT, 2, 6, 7.

RECEIPT.—See EVIDENCE, 17.

RECITALS.—See CONVEYANCE, 4.

#### RENT.

If the owner of land leased for a rent payable quarterly dies between two quarter days, and devises the land to trustees, "to receive and collect the income and produce thereof; and, after deducting all needful and proper costs, charges and expenses, to pay the residue of said income" to A. during her life, and on A.'s death the capital to B., the rent which falls due on the quarter day next after the death is not apportionable between the income and capital of the fund, but goes to the life-tenant: *Sohier vs. Eldridge*, 103 Mass., 345.

See CONTRACTS, 10.

RIGHT OF WAY.—See CONVEYANCE, 5, 6.

RES ADJUDICATA.—See ESTOPPEL, 1.

#### SALES.

1. In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, are issues which, under proper instructions, should be submitted to the jury: *Jones, Adm'r of Seals vs. Hook*, 47 Mo., 329.

2. It is the settled law of this State, that where the vendor of



real estate takes collateral security for the purchase money, he will be presumed to have waived his lien upon the land conveyed, and if he entertained a different intent, he must show it by satisfactory testimony: *Durette vs. Briggs*, 47 Mo., 356.

See TRUSTS, 1.

#### SET-OFF.

Where M., a creditor of an insolvent firm, received from S., one of its members, the note of a third person, the property of the firm, and gave to S. an obligation to apply a specified part of the proceeds, when collected, on the firm debt, and "to pay the balance to S. in cash." *Held*, that in a suit by the assignee of the obligation to recover such balance, M. is estopped by his agreement, from applying it by way of set-off to the indebtedness remaining due him from the firm. The non-performance of promises made by S. to M., for the payment of the balance of the firm indebtedness due him, which neither involve bad faith, nor qualify or vary the agreement between the parties, will not defeat the estoppel: *Miller & Co. vs. Florer*, 356; 19 Critchfield, O.

SETTLEMENT.—See PARTNERSHIP, 5, 7.

#### SCHOOL ORDER.

1. A school order, drawn upon the Treasurer of a district township by the President and Secretary thereof, is not a negotiable instrument, and the assignee thereof takes it subject to all equities and defenses that it would have been subject to in the hands of the payee. The assignee of such paper is bound at his peril, to ascertain the extent of the power of the officers of the district in issuing the same; and if issued without authority this defense may be made against an assignee thereof: *Boardman vs. Hayne et al.*, 339, 29 Iowa.

2. Nor would the officers issuing the same without authority, but under the impression that they had, and without any intentional fraud to an assignee thereof, (on the ground that the action was induced by the fraudulent action, and the consideration promised by him to nor received by the district. *Ib.*

#### SHERIFF.

His receipt for the collection of a debt,

becomes an agent for the collection, and is bound to use reasonable diligence. If, in consequence of negligence in obtaining judgment and execution in a reasonable time, the debt is lost, he is personally responsible: *Kinnard vs. Willmore*, 2 Heiskell, (Tenn.,) 619.

#### SLANDER.

1. On the trial of an action of slander, for words imputing a want of chastity, on a plea of not guilty, it is not allowable to prove the general reputation and belief of the community, that the house in which the plaintiff resided was a house of ill-fame: *Kacket vs. Brown*, 2 Heiskell, (Tenn.,) 264.

#### SPECIFIC PERFORMANCE.

1. A contract for the sale of lands made during the war, and at the factitious prices then prevailing, will not be specifically executed. A sale of lands to several persons, heirs or tenants in common, purchasing in unequal amounts, at unreasonable prices, as above, if set aside as to part who resist a specific execution of the contract, will not be enforced against those who insist upon its execution: *Hudson vs. King*, 2 Heiskell, (Tenn.,) 560.

See CONTRACTS, 8.

STAMPS.—See EVIDENCE, 23.

#### STATUTE OF LIMITATIONS.

The admission by one partner of a partnership debt, after the dissolution of the partnership but before the statute of limitations has taken effect, is sufficient to remove the bar of the statute as to all the partners: *Beirdsley vs. Hall*, 270, 36 Conn.

STAYOR.—See CONTRACTS, 4.

STAYOR.—See CONTRACTS, 4.

#### SURETYSHIP.

1. If a vendee sell lands purchased, and he and his vendee join in a note for the remainder of the purchase money to the original vendor, the presumption will be that the second vendee joins as principal—not as surety—and the acceptance of such a note by the original vendor will not raise a presumption of waiver of the lien reserved in a deed: *Hines vs. Perkins*, 2 Heiskell, (Tenn.,) 395.

2. If a surety to a note notify the holder to sue the principal, when by so doing the money could be made, his failure to sue discharges the surety: *Hopkins vs. Spurlock*, 2 Heiskell, (Tenn.,) 152.

See GUARDIAN and WARD, 1, 3; TRUSTS, 1.

TAXES AND TAX SALES.

1. The annual premiums of an insurance company received by an agent thereof residing in a city, are not subject to taxation as personal property, under the general power conferred upon the city by its charter, to provide for the taxation and assessment of all taxable property within the city. Such premiums are in the nature of a gross income, and do not constitute property in its proper sense: *The City of Dubuque vs. The Northwestern Life Insurance Co.*, 9, 29 Iowa.

2. A tax deed is void upon its face which shows several tracts of land sold together for a gross sum. But that a tax deed because it shows a sale *en masse*, does not of itself, render the sale invalid: *Ware et al. vs. Thompson et al.*, 65, 29 Iowa.

See ACTION, 7; BANK, 2, 3, 4; CITY, 1, 2.

CORPORATIONS, 2.

TENANTS IN COMMON.

Where one of two tenants in common of land, obtains the actual exclusive possession of the whole tract, claiming it as his own, and denying any right of his co-tenant in the premises, and upon ejectment being brought against him by his co-tenant to recover his interest, the defendant instead of entering a disclaimer as to the plea of not guilty, and set up the fact that these acts on the part of the defendant relieved the plaintiff from the necessity of any other evidence: *Noble vs. Mc*

PLAT.

executed, acknowledged, and put out on lands of the wife, exhibiting having inscribed upon a lot adjacent to Ohio & Penn. R. R.," this did not convey the lot to the railroad company, nor to V. & C. R. R. Co., 514, 19 Critch-

ing coverture, tending to show an intention to convey the said lot to the railroad company, on which the plaintiff has acted, estop her from asserting *Ib.*, 514.

## TRESPASS.

1. The owner in fee of land, has no right to make a forcible entry on a tenant holding over, or upon any other person wrongfully in possession; the law gives him an action and he must resort to it: *Farwell vs. Warren*, 51 Ill., 467.

2. Any unlawful exercise of authority over the goods of another will support TRESPASS, even though no force be exerted. Trespass will lie against the purchaser, with notice, of the goods of a third person at a sale under execution. The doctrine of CAVEAT EMPTOR applies to such a purchaser: *Hardy vs. Clendening*, 25 Ark., 436.

3. The administrator of a person instantly killed by the act of another, has a right of action, for the use of the wife and children of the deceased, and the damages are to be estimated, not only by the pain and suffering of the deceased, but also by the loss and deprivation occasioned to the wife and children: *N. & C. R. R. Co. vs. Prince*, 2 Heiskell, (Tenn.,) 580.

See DAMAGES, 4, 8.

TORT.—See ACTION, 2.

## TROVER.

1. The doctrine is well settled that an action of trover may be maintained by a naked bailee. And equally so by a pledgee for value; one in such position may loan the property pledged, temporarily, to the pledgor for a special purpose, and recover in trover, if the property is not returned to him: *Huelon vs. Arnett*, 51 Ill., 198.

2. Where a landlord took forcible possession of the demised premises, from which he removed the goods of the tenant and then refused to permit the tenant to take them away, that was held to be a conversion of the goods by the landlord, and the tenant might maintain trover therefor: *Hipple, exr., De Puie*, 51 Ill., 528.

## TRUSTS.

Neither the maker of a mortgage with a power of sale in a trustee, nor a surety of such maker, is released of the liability to the debt by the fact of a sale and receipt of the money by the trustee, the trustee having applied the money to the payment of other debts by the consent of the maker: *Loughmiller vs. Harris*, 2 Heiskell, (Tenn.,) 253.

UNDUE INFLUENCE.—See WILLS, 3.

USAGE.—See BROKER 1, CONTRACTS, 7.

USURY.—INTEREST, 1, 2. ASSIGNMENT, 7.

**VENDOR'S LIEN.**

1. Taking a note, not by way of security, but as a mode of payment of the price of the land, is not a waiver of the lien, but on failure of payment the lien may be enforced. A conveyance afterward, and before the non-payment was ascertained, is not a waiver, though the deed recite that the purchase money is paid: *Denny vs. Steakly*, 2 Heiskell, (Tenn.,) 156.

2. If a vendee of lands, with a reservation of a lien on the face of the deed, sell to another, and procures him to execute notes to the vendor, which are substituted in lieu (not accepted in satisfaction) of the notes of the first vendee, in absence of express proof of the retention of the lien, the presumption will be that the lien is not waived.

Such lien reserved, stands on a different footing from the implied lien of a vendor who has conveyed, and will be superior to conveyances made by the second vendee: *Hines vs. Perkins*, 2 Heiskell, (Tenn., 395.)

**WAGER.**

An action will lie and a recovery may be had against a stakeholder for the amount of a wager placed in his hands, and which he paid over to the other party, after being notified by plaintiff not to do so: *Arkins vs. Fleming*, 122, 29 Iowa.

**WAIVER.**—See EXECUTOR, etc., 5; LIEN, 5; MISTAKE, 2; SALES, 2; SURETYSHIP, 1; VENDOR'S LIEN, 1, 2; BILLS AND NOTES, 10.

**WARRANTY.**—See DISSEISIN; CONTRACTS, 11.

**WASTE.**—See ACTION, 11.

**WIFE.**—See EVIDENCE, 11.

**WILLS.**

1. An oral disposition of property on the day immediately preceding his decease, by one who had been an invalid for fifteen years, and for eight months previous to his death had been confined to his house, gradually yielding to the ravages of consumption, had been admonished by his physician that recovery was hopeless, and who died in the full possession of his faculties, will not be recognized as a nuncupative will: *O'Neill vs. Smith*, 33 Md., 569.

2. On the trial of an issue *devisavit vel non*, the evidence of the declaration of a deceased subscribing witness, that the testator was

of unsound mind at the time of the execution of the will, is not admissible in evidence: *Sellers vs. Sellers*, 2 Heiskell, (Tenn.,) 430.

3. If a testator has a sound, disposing mind, his will, obtained by the wife, in her own favor, without fraud or misrepresentation, but by fair importunity, and by the influence which she has acquired by affection and kindness, is a valid testament. That is not undue influence in the sense of the law.

4. Mere injustice or inequality in the disposition of an estate by will, affords no ground for impeaching it. It is the legal right of the citizen to give his estate by will to a stranger to his blood; and the disposition of juries to set aside wills because of an inequitable disposition of the testator's property, deserves the severe reprobation of the courts: *Smith vs. Harrison*, 2 Heiskell, (Tenn.,) 231.

5. The condition and position of the testator when his will is attested, in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress and—unless blind—the signing of the witnesses must occur where the testator, as he is then circumstanced, may see them sign, if he chooses to do so: *Aiken vs. Weckerly*, 482, 19 Mich.

See EXECUTOR, ETC., 1, 2; FRAUDS, STATUTE OF, 3.

WITNESS.—See PARTNERSHIP, 1.

*Digest of English Law Reports for September and October, 1871.*

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EQUITY SERIES.

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DEED.

*Construction.—Younger Son.—Vesting.*

A FATHER'S estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail: Held, (affirming the judgment of the Master of the Rolls,) that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estate: *In Re Bayley's Settlement*, 589, vol. 6.

GIFT.

*Charitable Gift.—Insufficient Description.—Cypres.—Evidence of Surrounding Circumstances.*

Where in a gift to a charity the object of the gift is imperfectly described, and uncertainty as to it in consequence arises, evidence of the donor having been interested in or a subscriber to any particular society is admissible to show what was in her mind when making the gift. A testatrix gave a legacy to "the treasurer, for the time being, of the fund for the relief of the widows and orphans of the clergy in the diocese of Worcester." At the date of the will there was no society so named, but there was a society which had formerly fulfilled that office for the diocese, but had lately been restricted, both in name and in its operation, to the archdeaconry of Worcester.

ly had subscribed to this society in both also a similar society—with which the ted—in the archdeaconry of Coventry, diocese. Held, that the testatrix must ie legacy to the Worcester Society in the whole diocese, and it must be considered , society, and the legacy must be divided *Kilvert's Trusts*, vol. 12, p. 183.



## MARRIAGE.

*Marriage Articles—Marriage Contract—Default by one Party—Condition Precedent.*

By articles made previously to a marriage, the wife's father covenanted to make certain payments during his life, and to settle three-tenths of his real and personal estate at his death upon the husband and wife during their respective lives, and after their death on their issue; and the husband covenanted to insure his life and to settle the policy, and also other property, in like manner. In default of issue, the property settled by the husband was to revert to him. The marriage took place, and the wife died without issue, and afterwards the father died. The husband did not insure his life or settle his property as agreed, and refused to execute the settlement which had been drawn in pursuance of the articles. A suit having been instituted for the administration of the father's estate, the husband claimed to prove for the value of his life interest in three-tenths of the father's real and personal estate. Held, (affirming the decision of the Master of the Rolls,) that it was no answer to the husband's claim that he had refused to perform his part of the agreement, inasmuch as the contract between the parties had been partly performed by the marriage, and the performance by the husband was not a condition precedent to the performance by the father. The claim was therefore allowed: *Jeston vs. Key*, 608, vol. 6.

## POSSESSION.

*Possession of the Agent—Adverse Possession—Wrongful Claimant—Statute of Limitations—3 & 4 Will., 4, c. 27, s. 9.*

Possession of an agent is possession of the principal; and the principal may acquire a possessory title to real estate by receiving rents for twenty years through an agent, although that agent is the person really entitled to the estate. A person claiming, without any real title, to be entitled to land is a person "wrongfully" claiming within the meaning of 3 & 4 Will., 4, c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property: *Williams vs. Pott*, vol. 12, p. 149.

## PUBLIC BODY.

*Riparian Proprietors—Evidence.*

Where a public body is, under an Act of Parliament, entrusted

with powers and duties for a public purpose, the Court will give credit to them as being the best judges of what they want for that purpose.

A railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect: *Atto'-General vs. Great Eastern Railway Co.*, 571, vol. 6.

#### TRADE-MARK.

##### *Consignee of Goods bearing spurious Mark—Parties—Costs—Lien on Goods.*

A person having in his hands or under his control, goods bearing a forged trade-mark, is bound, upon the fact being brought to his knowledge, at once to submit to do whatever he might be compelled to do upon bill filed; otherwise, however innocently the goods may have come to him, he will be liable for the costs of a suit instituted by the person whose right is infringed for the purpose of obtaining relief.

A firm of forwarding agents, carrying on business in London, received from correspondents abroad a case of cigars bearing a forged brand. Upon the forgery being shown to them, they expressed their willingness to give, and afterwards gave, full information as to the manner in which the cigars came into their custody; and upon a suit being instituted against them, submitted to act as the Court should direct; but they wished to return the cigars to their correspondents, and to some extent defend the suit on their behalf. Held, that they were not entitled to their costs. The plaintiffs, in a suit to restrain infringement of their trade-mark, Held entitled to have a spurious imitation of their mark removed from goods, and to a lien on goods for costs: *Upmann vs. Elkan*, vol. xii., 140.

#### WARD OF COURT.

##### *Religious Education—Religion of Father.*

A Roman Catholic died, leaving a widow who was a Protestant, and an infant daughter, then six months old. He left no directions as to his child's religious education. The child was brought up by her mother as a Protestant till she was eight years and a half old. A suit having been instituted for the administration of the father's

estate, the Court made an order that the child should be brought up in the Roman Catholic faith. The Court did not think it advisable to have an interview with the child: *Stourton vs. Stourton* commented on, 8 D. M. & G., 760: *Hawksworth vs. Hawksworth*, vol. 6, p. 538.

### WILL.

#### *Construction—Absolute Interest.*

A testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and family." The widow by her will, gave a part of the testator's estate to an illegitimate son of one of the testator's sons. Held, that the gift was valid: *Lamb vs. Eames*, 601, vol. 6.

### WILL.

#### *Absolute Gift at Twenty-five—Gift Over—Time of Vesting—Costs of Appeal.*

A testator bequeathed all he should die possessed of to be equally divided between his two sisters, to be invested in their names as they should direct; one sister (who was then over twenty-five years of age) to have the immediate control of her share, and the other sister upon attaining twenty-five years, until which time it was to be held in trust for her; and in case of the death of either of his sisters before him, or before marrying and having children, the whole of the property to go to the survivor. The elder sister married and had children. Held, that the gift over to the surviving sister, on the contingency of the death of the other before marrying and having children, was referable to such death occurring before she should attain the age of twenty-five years; and that the younger sister, on attaining twenty-five, though still unmarried, became absolutely entitled to a moiety of the property.

An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs: *Clark vs. Henry*, 588, vol. 6.

*Digest of English Law Reports for September and October, 1871.*

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COMMON LAW SERIES.

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ATTORNEY AND CLIENT.

*Authority of Attorney after Judgment—Agreement to Postpone Execution.*

AN ATTORNEY retained for the conduct of an action has no implied authority, after judgment in favor of the client, to enter into an agreement on his behalf to postpone execution: *Lovegrove vs. White*, 438, vol. 6.

BANKERS.

*Bill of Exchange—Payment of, by Bankers under a Mistake.*

The bankers at N. have accounts at the branch bank there of the defendants, the Bank of England; and it is the practice that each banker, having previously ascertained that the bills, checks, &c., on the other banks will be paid, hands them to the defendants for col-

l-  
y, at 2 P. M., present the bills, &c.,  
drawn upon the defendants for the  
then placed to the debit of the drawee's  
If the defendants are themselves the  
drawee, they are to be paid earlier in the morning to ascertain  
if so, it is left with the drawee, and a  
check is drawn, and afterwards, upon the presenting  
note is taken into the account, and  
the check on the defendant is given.  
at 3 P. M., but the bankers' accounts  
are kept open till 4; and between those  
the purpose of having the day's accounts  
investigated, and of rectifying any  
mistakes that may have arisen, and of finding  
the balance between them; and all mistakes and  
of the day, are subject to correction during

con-  
sult with the defendants' branch bank,

and the defendants discounted' for them a bill, accepted payable at L. & Co., (one of the bankers at N.,) of which the plaintiffs were the payees and indorsers. On the morning of the day when the bill became due, the defendants' clerk took the bill to L. & Co., and it was marked by them for payment, and a credit-note was given to the defendants including the amount of the bill. About 2 P. M., the same day, the defendants' clerk took all the checks drawn on L. & Co. and the credit-note to L. & Co., and they handed to the defendants' clerk a check for the aggregate amount. After the closing of L. & Co.'s bank on the same day, the clerk, who had given the credit-note including the bill, ascertained from the ledger keeper that the acceptor had not a balance sufficient to meet the bill, and it was also further ascertained that he had stopped payment. Thereupon, at 3:30 P. M., L. & Co.'s out-teller requested the defendants to take back the bill. This the defendants did under protest. At this time the defendants had already placed the amount of the bill to the debit of L. & Co. in their account with the defendants. Neither the plaintiffs nor the defendants sustained any damage from the mistake of L. & Co. Held, that the plaintiffs were entitled to have credit with the defendants for the amount of the bill, as there was nothing in the facts or practice to show that the payment of the bill by L. & Co. under the circumstances, was merely provisional, and subject to revocation provided notice was given before the final closing of the accounts at four o'clock: *Pollard et al. vs. The Bank of England*, 622, vol. 6.

#### MARINE INSURANCE.

*Policy to cover Goods upon Ship or Ships to be declared—Misnomer—Innocent Misrepresentation, Effect of—Slip of Policy—30 Vict., c. 23, ss. 7, 9.*

The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared, is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel's name is to identify the particular adventure, and the assent of the underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select.

If a representation be made by the assured to an underwriter, however honestly and innocently, that a ship is new, when in fact she is old, a policy of insurance of goods on board of her made by him

will be vitiated, for the age of the vessel must be material in considering the premium.

If the description in a policy of insurance designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars, will not annul the contract, and a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy.

30 Vict., c. 23, s. 7, enacts that no contract or agreement for sea insurance shall be valid unless expressed in a policy, and thereby renders an underwriter's slip incapable of being enforced either at law or in equity; but notwithstanding that statute, a slip may be given in evidence wherever it is, though not valid, material: *Ionides and Chapeausonge vs. The Pacific Fire and Marine Insurance Co.*, vol. vi, p. 673.

#### PARTNERSHIP.

##### *Partner—Authority of.*

There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name: *The Alliance Bank vs. Kearsley*, 433, vol. 6.

#### PRINCIPAL AND AGENT.

##### *Contract with Broker when Principal disclosed—Parol Evidence—Election.*

C., a broker, was authorized by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold. Notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and the market falling, C. was called upon by the plaintiffs to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant. *Held*, that the fact of the defendant's name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstances under which the contract was made was admissible; and that the insertion of C's name in the contract, though his principal was known at the time, and the subsequent demands upon

C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only: *Calder et al. vs. Dobell*, 485, vol. 6.

#### VENDOR AND VENDEE.

*Sale of Chattels—Passive Acquiescence of a Seller in the self-deception of the Buyer does not entitle the latter to avoid the Contract.*

The plaintiff offered to sell to the defendant oats, and exhibited a sample; the defendant took the sample, and on the following day wrote to say that he would take the oats at the price of 34s. per quarter. The defendant afterwards refused to accept the oats on the ground that they were new, and he thought he was buying old oats; nothing, however, was said at the time the sample was shown as to their being old; but the price was very high for new oats. The judge left to the jury the question whether the plaintiff had believed the defendant to believe, or to be under the impression, that he was contracting for old oats; and, if they were of the opinion that the plaintiff had so believed, he directed them to find for the defendant. The jury having found for the defendant, *Held*, that there must be a new trial:

Per Cockburn, C. J., on the ground that the passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to avoid the contract.

Per Blackburn, J., on the ground that there is no legal obligation in a vendor to inform a purchaser that the latter is under a mistake not induced by the act of the vendor; and that the direction did not bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old.

Per Hannen, J., on the ground that the direction did not sufficiently explain to the jury that in order to relieve the defendant from liability, it was necessary that they should find not merely that the plaintiff believed the defendant to believe that he was buying old oats, but that the plaintiff believed the defendant to believe that he, the plaintiff, was contracting to sell old oats: *Smith vs. Hughes*, 597, vol. 6.

#### WILLS.

*Construction—Specific Devise.*

A testator devised a freehold estate to his son John, for life, and



after his death to his child or children, if any, in fee; "but, in case my said son John should die without lawful issue, then unto and equally between my sons George and Robert, in the same manner as the estates herein devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow."

He then devised separate freehold estates to his sons George and Robert in precisely similar terms, *mutatis mutandis*. Then followed the proviso referred to, in each of the above devises,—“Provided that, in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow, and her assigns, for life.” The testator died in 1843. Robert died a bachelor, in 1848. John died in 1861, and George in 1867, each leaving a widow, but no children. *Held*, by Bramwell, Channell, Pigott and Cleasby, BB.,—reversing the judgment of the Court of Common Pleas,—that the limitation to the widows included only the shares originally and directly devised to John and George:

*Held*, by Kelly, C. B., and Blackburn and Mellor, J. J., that the limitations to the widows included the shares accruing to John and George on the death of Robert, as well as the shares originally and directly devised to John and George: *Melsom vs. Giles and Wife*, 532, vol. 6.

## WILLS.

### *Devise, Construction of—Repugnant Provisions—Life Estate—Remainder in Fee.*

Testator devised as follows: “I devise and bequeath to my dear mother, Mary, the wife of R. G., all my real and personal estate, &c.; and, knowing that what I give, devise and bequeath to my said mother will become the property of her husband, my kind step-father, R. G., I therefore declare the intention of this my will to be, that the said R. G., being my dear mother’s husband, and a kind step-father to me, shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, to be absolutely at his free will and disposal; provided, that he does not at any time dispose of any portion of my said property to any or either of my late father’s, T. G.’s, family, who have lately treated me so unkindly.”

*Held*, by the Court of Common Pleas, that the mother took an estate for life in the realty, and R. G., the step-father, a remainder in fee.

*Held*, by the Exchequer Chamber, that, whatever was the nature of the interest taken by the mother, R. G. took an estate in fee.

## RECENT AMERICAN DECISIONS.

Circuit Court United States.—District of California.

[OCTOBER, 1871.]

TRADE-MARK—CONSTRUCTION OF THE U. S. ACT—BARREL.

MOORMAN vs. HOGE.

*The certificate of the registry of a trade-mark, issued by the Commissioner of Patents under the Act of July 8, 1870, is not conclusive evidence that the device so registered is, or can become, a lawful trade-mark.*

*A barrel of peculiar form cannot be protected as a trade-mark.*

SAWYER, J.—This is a Bill in Equity, the object of which, is, to obtain a decree restraining an alleged infringement of complainant's trade-mark.

From some time prior to 1857, till July 2, 1860, one J. H. Cutter and complainant, Moorman, were doing business as partners at Louisville, Kentucky, under the name of "J. H. Cutter & Co." The firm was engaged in the manufacture and sale of whiskey. Their whiskey acquired throughout the country, and particularly in the State of California, a high reputation for excellence, and, was generally known as "Cutter Whiskey." The said "J. H. Cutter & Co.," adopted for their California trade, a barrel of peculiar shape and size, in which their whiskeys for said market, were put up, shipped and sold. The said barrel was adopted as a trade-mark, in part, to enable dealers in whiskeys to more readily distinguish the whiskeys of said firm, from those manufactured and sold by other parties. The said barrel is made of staves, thirty-eight inches in length, and one and one-fourth inches thick. It is twenty inches diameter at the

heavy iron hoops, and is of the ordinary whiskey barrels are but of half that thickness, and fewer forty gallons.

id "J. H. Cutter & Co.," to consold by them, were branded on ter, Old Bourbon," and "J. H. "J. H. Cutter," being in an arc

of a circle, the words "Old" and "Pure," respectively being in straight lines within the arc under the words "J. H. Cutter," and the words "Bourbon" and "Old Rye," on a straight line directly under the others, below the arc formed by the name. The initials, "J. H. C.," were also branded on the barrel near the bung hole, as a bung mark.

In the year 1859, they added an English crown, as a part of the trade-mark, which was branded on the head just below the centre, and under the words "J. H. Cutter, Old Bourbon," and, "J. H. Cutter, Pure Old Rye."

Their barrels and marks were used by said J. H. Cutter & Co., in their whiskey trade till on or about July 2, 1860, when said J. H. Cutter, for a valuable consideration, sold and transferred all his right, title and interest in the business, and to the trade-marks and brands, and the sole right to use and sell the same, to the complainants in this cause; and the said complainants under the firm name of "C. P. Moorman & Co," have continued to carry on the said business, of manufacturing and selling whiskeys at Louisville, Ky., and putting them up and selling them in said barrels, branded with said marks, from said date to the present time, claiming the said barrel, and said marks as their trade-marks.

In the month of November, 1870, the complainants filed, and caused to be recorded in the United States Patent Office, at Washington, a verified statement and claim of said trade-mark, having annexed thereto a fac simile of the said barrel, together with the marks aforesaid branded thereon, and under the English crown, the further words in five elliptical lines, "A. P. Hotaling & Co., San Francisco, Sole Agents for Pacific Coast." And on the other end, in three lines forming an ellipse, the words, "C. P. Moorman & Co., Manufacturers, Louisville, Ky.;" and, thereupon, the United States Commissioner of Patents issued to said complainants the certificate provided for in the Act of Congress relating to the subject. A true copy of the fac simile of said barrel, and of the said marks branded thereon, is annexed to the Bill.

Upon the issue as to whether J. H. Cutter was the originator of said barrel, and whether he and his successors, the said complainants, solely used said barrel, and, whether it was generally known in the whiskey trade as the "Cutter Barrel," the testimony is very voluminous, and is in striking conflict. After a careful consideration of the testimony, my mind is forced to the conclusion, notwithstanding

the large amount of testimony to the contrary, that J. H. Cutter did originate, and, first use, this peculiar barrel in the whiskey trade; that the barrel was of unusual form and dimensions; that when the pattern was furnished, it was necessary to have staves and other stock got out expressly for this barrel; that Cutter adopted it for his whiskeys, and continuously used it for the California trade till he transferred his interest in the business, and barrel and brand, to complainants; and that the complainants have continued to use it from that time till the present, claiming it as their barrel; that the said barrel has not been used by other parties except occasionally, when it has been manufactured clandestinely, and used without the knowledge, or when known, against the protest and claim of the complainants, and their assignor, that especially for upwards of ten years last past, the complainants and their assignor, have shipped every year, large quantities of whiskeys in said barrel to California, and sold them on the Pacific coast under the name of Cutter Whiskey, and, that no other person has, during that time, and prior to the acts of defendants complained of, shipped any considerable quantity of whiskey in similar barrels; that the said barrel had become very generally known in the trade in San Francisco, and on the Pacific coast as the "Cutter Barrel," so much so, that, if a party familiar with the trade, and this barrel, should see such a barrel, even at a distance, as across the street, he would expect to find it contain "Cutter Whiskey."

The defendants are agents at San Francisco, California, for the sale of whiskeys on the Pacific coast for Jesse Moore & Co., a firm engaged in the manufacture and sale of whiskey at Louisville, Kentucky. Within the two years next preceding the filing of the bill, said Jesse Moore & Co., shipped to defendants at San Francisco, several hundred barrels of whiskey for sale, and the said defendants have sold and they are now engaged in selling said whiskeys in California, and elsewhere on the Pacific coast. Said whiskeys are put up in barrels, which are in all respects, as to size, shape and general appearance so far as the barrel itself is concerned, a close imitation of the barrel which complainants use for their "Cutter Whiskey."

The appearance of the two barrels is, manifestly, alike, and any party looking at the two barrels without regarding the marks on them, would at once pronounce them the same barrel. The defendants, doubtless, intended the barrels to be alike; for they directed their principals to send their whiskey in such barrels; and that they

might do so, sent them the measures of the barrels used by the complainants, called the "Cutter Barrel." But the marks on the barrels are wholly different. The Bourbon Whiskey barrel of defendants has branded on one head in the center within a circle burnt into the head, and in a circular form, the words "G. H. Moore, Bourbon," and within the circle formed by these words the word "Old," in a straight line with a star above and below it. Over this center brand are the words "E. Chievolich & Co.," forming the arc of a circle, and under these words, in three straight lines, are the words "San Francisco, Cal., Sole Agents for the Pacific Coast;" and at the bung as a bung-mark, the initials, "G. H. M."

The Rye Whiskey barrel has the words in a similar form and situation, "E. Chievolich & Co., San Francisco, Cal., Sole Agents for the Pacific Coast. J. Moore & Co., Old Rye Whiskey;" and as a bung-mark, the initials, "J. M."

There is no similarity in the marks and devices branded on the barrels of the respective parties, or in the form in which the words are arranged. There is nothing in these marks or devices aside from the barrels, that would lead a purchaser to mistake one for the other. The only similarity between the packages is, the barrel itself, independent of the marks upon it, but in this particular the defendants' package is a clear imitation of complainants'.

As there is no claim that there is any simulation of the marks or brands on the barrels, it will be unnecessary to more particularly describe them.

The defendants sell their whiskeys as Jesse Moore & Co's whiskeys, and make no representation that their whiskey is "Cutter Whiskey," other than so far as the fact that they use a similar barrel to that in which the "Cutter Whiskey" has been so long sold, as to become known as the package which ordinarily contains "Cutter Whiskey," can be regarded as such a representation.

Complainants do not claim that there is any infringement upon that part of what they claim to be their trade-mark, which consists of the words and devices stamped upon the barrel. The claim is that there is an infringement by the use of the barrel only.

Is the plaintiff entitled to the exclusive use of a barrel of this peculiar form, construction and capacity, without regard to any mark or device impressed upon, or connected with it? Can a barrel of this description be appropriated as a trade-mark, or substantive part of a

trade-mark, so as to exclude the rest of the world from using it in the same branch of business? If so, the complainant in my judgment, is entitled to the relief sought, otherwise, not.

Complainants invoke the Act of Congress, of July 8, 1870, entitled "An Act to revise, consolidate and amend the statutes relating to patents and copyrights." (16 Stat. at L., 198.) The seventy-seventh section provides: "That any person or firm domiciled in the United States \* \* \* and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt, and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements, to-wit:" stating the conditions.

The seventy-eighth section provides that the party or firm, performing the statutory conditions, shall be entitled to use the trade-mark for thirty years, and that "no other person shall lawfully use the same trade-mark, or substantially the same, or so nearly resembling it, as to be calculated to deceive upon substantially the same description of goods." The seventy-ninth section provides a remedy for violation of the right, by imitation, etc., by action for damages, and, for injunction. It also provides that the Commissioner of Patents shall not receive and record any proposed trade-mark which *is not, and can not become, a lawful trade-mark.*" The eightieth section makes the certificate of the Commissioner under seal of the Patent Office, "evidence in any suit in which such trade-mark shall be brought into controversy."

It is not denied that the complainants have performed all the acts required by the Act of Congress to secure the protection contemplated, and that the certificate of the Commissioner of Patents is in form regularly issued. This being so, complainants insist that the Court can only look to the certificate, and the Act of Congress, to determine the question at issue; that the Act of Congress confers

examine and determine whether it shall become a lawful trade-mark; and by the claimant, or is not identical with the same class of goods, already registered, or received, and does not so nearly resemble any other, as to be likely to deceive. To determine these matters, the questions are not open to



examination in this Court: *Rubber Co. vs. Goodyear*, 9 Wal., 796, and *Eureka Co. vs. Bailey Co.*, 11 *Ib.*, 492, are cited as sustaining the proposition.

I can not assent to this view. The cases cited only go to the point that a patent cannot be collaterally attacked on the ground that the extension and re-issue of the patents in question had been procured by fraud. It was held, that, if the patents themselves were to be avoided on the ground of fraud in their issue, the patents being otherwise good, it must be done by a direct proceeding in equity to vacate them. That is an entirely different question from the one now presented. The proceeding before the Commissioner to obtain protection for a trade-mark under the Act of Congress is purely *ex parte*. Other parties have no notice, actual or constructive. They have no opportunity to be heard, and their rights can not be thus conclusively determined in a proceeding to which they are in no sense parties. The certificate of the Commissioner of Patents, I take it, can have no more conclusive effect as to the rights of third persons, than a patent issued under the Patent Laws by the same Commissioner of Patents. The Commissioner in such cases is required to investigate the claim to the patent, and to determine whether the subject of the application is patentable; whether the applicant is the inventor; whether it is new, and useful, etc. While the patent is held to be *prima facie* evidence, that the machine is new and useful, it is no where held to be conclusive, on these points, or upon the point whether the machine or device or article, is the proper subject of a patent. On the contrary, in every day practice in the courts in patent cases, the very questions most frequently considered and determined, are, whether the thing patented is patentable; whether it is new, or useful, etc., and in the very cases cited to sustain complainants' position, the Court determined questions as to the patentability of the articles involved in the patent. If the principle contended for could be maintained, there is not a barrel or package of any kind in use in mercantile transactions, which could not be appropriated as a trade-mark, no matter how long, or how generally it had been in use, if a party could, in an *ex parte* application, by any representation, fraud, or other means, once procure it to be registered, and the certificate issued; for this would be conclusive upon all the world, upon the points that it could become a trade-mark, and that the applicant was the first to appropriate and use it, for that purpose.

This point, in my judgment, must be determined against the complainants.

This brings us to the great and highly important question, whether a barrel of peculiar form and dimensions, without any marks, symbols or devices of any kind impressed upon it, or connected with it, can, in fact, and in law, become a trade-mark, or a substantive part of a trade-mark, so as to invest the claimant with an exclusive right to use it. It will be observed, that the statute under which the claim is made, does not define the term "trade-mark," or say of what it shall consist. The term is used as though its signification was already known in the law. It speaks of it as an already existing thing, and protects it as such. The thing to be protected must be an existing *lawful* "trade-mark," or something that may then for the first time be adopted as a lawful trade-mark, independent of the statute. There must be a lawful trade-mark adopted without reference to the statute; and then, by taking the prescribed steps, that trade-mark so already created and existing, may receive certain further protection under the statute. This is apparent from the language of the seventy-seventh section, which speaks of parties "who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use," etc.; and, by the seventy-ninth section, which forbids the Commissioner to receive and record any proposed trade-mark *which is not, and can not become a lawful trade-mark*. It does not say what shall constitute a lawful trade-mark. We must, therefore, go to the law of the land, outside of this statute, to ascertain what *is*, or what *may become a lawful trade-mark*; for the statute leaves the definition of a trade-mark to the law as it before stood. The definition of a trade-mark given by Mr. Upton is as follows, to-wit: "A trade-mark is the name, symbol, figure, letter, form, or device, adopted and used by a manufacturer or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end they may be known in the market, as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise." (Upton on Trade-marks, p. 9.)

This is a good general definition, broad enough in its terms, probably, to cover every case to be found in the books, but it would not, alone, perhaps, be sufficient as a test by which every individual claim of a device as a proper trade-mark can be tried and determined, without looking into the cases from which the definition is compiled, to see what names, symbols, figures, letters, forms and devices have been recognized and protected as trade-marks. The words "forms,"

and "device," for instance, are very broad terms, and they might in a general and comprehensive sense, embrace the form of a barrel, or package, or the article of merchandise itself sold. But the words of definition are all used in connection with the word, "mark," and the word mark, in its first, and usual signification is defined in Webster to be, "a visible sign, made or left upon any thing; a line, point, stamp, figure, or the like, drawn or impressed, so as to attract the attention, and carry some information, or intimation; a token, a trace." And some such mark used in connection with, impressed, cut or stamped upon, or attached to the article manufactured, or sold, in the ordinary course of trade, embraces the usual and ordinary idea of a "trade-mark." The primary and the sole object of the trade-mark is, to distinguish the goods as being a particular manufacture, or as belonging to a particular party. It is cut, stamped, engraved, impressed upon, and attached, or, in some way appended to the goods, the vessel containing them, or the covering wrapped around the goods for this sole purpose. The object of using a barrel, box, or other package, is to contain, carry, protect and preserve the goods, or for their convenient handling, and *form* of some kind and dimensions are essential in a box, barrel, or package, without which it can have no existence. But the size or shape of the barrel, box, or package, can scarcely be considered a *mark*, nor can that be the sense in which the terms "form" or "device" are used when employed as a definition of a *mark*, used for purposes of trade. So general is the idea that the symbol, figure, letter, form, or device, used for a trade-mark, must be a mark, impressed, cut, engraved, stamped, cast upon, or in some way wrapped around or appended to the article or the package, as something independent of the article itself, or the package used to contain it, that it is carried into the statutes of some States, where it is, doubtless, only intended to adopt the common law definition.

Thus, in the statute of California, the language used is, "any peculiar name, letters, marks, devices, figures, or other trade-mark, or name, cut, stamped, cast, or engraved upon, or in any manner attached to, or connected with, any article, or with the covering or wrapping thereof, manufactured, or sold," etc. This indicates that it was not supposed that the barrel, package, covering or wrapping themselves, which are used for another purpose could properly be used as a trade-mark, but that the trade-mark must be some mark of the kind indicated in some way, impressed, cut, cast upon, or connected with, such package, covering, etc., or the article itself.

The complainants in this case, prior to the passage of the Act of Congress in question, filed their trade-mark in the office of the Secretary of State, of California, and, in so doing, they omitted the barrel as a part of their trade-mark, although it had, long before that time, been adopted and used by them in their California trade. The reason assigned for this omission by their counsel, on the argument of this cause, in answer to the suggestion that the omission constituted an abandonment of the barrel, was, that, under this statute of California, they could not adopt the barrel as a trade-mark, for that the trade-mark, under the Act, must be cut, engraved, stamped, impressed, cast, etc., on the barrel, package, etc.; and this, I apprehend, is the true idea of a trade-mark at common law with respect to this point.

I have examined with care, a large number of cases involving infringements of trade-marks, including all the recent cases which I have been able to find, so far as they bear upon the question in hand. It would be an arduous and unprofitable task to comment upon them all, and I shall content myself with stating briefly, the result of my examination.

In every case there was a *trade-mark* proper, such as is indicated in this opinion, embracing some name, symbol, figure, letter, form or device, cut, stamped, cast, impressed or engraved upon, blown into or in some manner attached to or connected with the article manufactured or sold, or the package containing it, or the covering or wrapping thereof. When the vessel containing the article was of glass, iron or other metal, whether of peculiar shape or dimensions or not, the trade-mark proper, was often blown or cast in the vessel—sometimes on a shoulder, sometimes into the body of the vessel. There are various ways of impressing upon, or connecting with the vessel, package or article, the mark; but there always was a mark in fact, other than the shape or size of the vessel or package. I find no case where the vessel, box, package, or whatever contained the article, has been held to constitute a trade-mark by reason of its *peculiar form or dimensions*, independent of any symbol, figure or device, impressed upon or connected with it, for a trade-mark. I find no case where the use of a package of peculiar form and dimensions has been restrained without having imprinted upon, or connected with it, some other symbol, word, letter or form, adopted as a trade-mark. There are numerous cases where the use of a bottle or other package, having upon it the device adopted as a trade-mark, has been enjoined; but

I find none restraining the use of the bottle, vessel or package without the device impressed upon or connected with it.

A manuscript copy of a recent decree rendered by the Court of Chancery, at Louisville, Kentucky, in the case of *Wilder vs. Wilder*, has been furnished me by complainants' counsel, as a case in point. But in that case, the defendants were restrained from selling "any preparation or compound under the name and style of 'J. B. Wilder & Co.'s Stomach Bitters,' *printed, stamped or engraved upon the bottles, labels, wrappers, covers, boxes or packages* thereof. Also, from using the *bottle herein* exhibited, marked 'B. 2,' and from imitating or causing to be imitated, in any manner, either the *bottle* or label of the plaintiff herein marked respectively, 'A. and B.' "

This case does not appear to be in any respect inconsistent with the view indicated. Here was a trade-mark proper in connection with the bottle, and, as the court restrained defendants from selling the compound in connection with the trade-mark, "printed, stamped or engraved *upon the bottles*," doubtless, the complainant's bottles referred to as exhibits in that case, had the trade-mark impressed upon, or blown into the bottles; and this being so, it would be impossible to use those bottles without their having the trade-mark on them, and therefore, also using the trade-mark itself. The trade-mark, in such cases, constitutes a part of that particular bottle. If this is not the true state of facts, then the copy of the decree furnished me does not show what the exact case is. At all events, it does not *appear* to be an exception to the general rule above stated. There are numerous cases where the use of a particular bottle or package has been restrained, when the bottle or package had the trade-mark impressed upon, or blown into its structure, making it a part of the package itself, and it was necessary to include the particular description of bottle in order to restrain the use of the trade-mark indelibly impressed upon it. But, as before stated, I find no instance where the use of a bottle, vessel or package of a peculiar form and size, has been enjoined, with the trade-mark of the complainant, or colorable imitation thereof, used upon, or connected with it, omitted.

Doubtless, a bottle, vessel or package of a peculiar form, may be used as auxiliary to the trade-mark proper, and may be of use in solving a question of intent of a party, in imitating or using an evasive simulation of another's trade-mark. As, for instance, a party may adopt a trade-mark, and imprint upon it, or connect with it, the package of peculiar shape, containing the articles of his manufacture

Another party might make a colorable simulation of the trade-mark so used, but so different as to render it doubtful, upon a mere inspection of the simulation of such mark alone, whether it was intended to be an imitation or not, or whether it would be likely to mislead the public. But if the imitator should, in addition to this, use the peculiar-shaped package adopted by the party entitled to the trade-mark, and impress upon or connect with it the simulation of the trade-mark, all doubt as to the intention and the effect, would at once vanish. In this view, a peculiar package might be a valuable auxiliary to the trade-mark, although it could not, of itself alone, constitute a lawful trade-mark, or a substantive part of a lawful trade-mark. But its use would be in aiding to determine the character and effect of a colorable imitation of the trade-mark proper, and the use of the imitation, or the simulated trade-mark, or the use of the package with such simulation connected with it, would be the thing restrained. In this case there is no pretense that there is any imitation or colorable simulation of the marks and brands upon the package or barrel. The use of the barrel, with a simulation of the complainant's trade-mark impressed upon it, would, doubtless, be restrained. But to extend the privilege of trade-mark to the barrel in question alone, without having impressed upon, or in any way connected with it, any of the words, symbols or devices claimed and used by the complainants as a part of their trade-mark, or any colorable imitation of it, would, in my judgment, be to go further than any case heretofore decided, and extend the privileges of trade-mark to subjects not recognized by any established legal principles applicable to the subject. After a careful examination of the question, my conclusion is, that the barrel in question, without any other marks or symbols, is not, and that it can not become, a lawful trade-mark, or a substantive or integral part of a lawful trade-mark, and that complainants have no exclusive right to its use as such.

The result is, that complainant's bill must be dismissed with costs, and it is so ordered.



## CHANCERY COURT NEW JERSEY.

[OCTOBER, 1871.]

### BLACK ET. AL. vs. THE UNITED COMPANIES OF NEW JERSEY.

1. *That the act of 1870 gives authority to the United Companies to lease to a corporation of another State.*
2. *That their works form both connected and continuous lines with the works of the proposed lessee.*
3. *That the directors of these companies have power to sell, or otherwise dispose of, all the property of the companies, except the roads and canal and the franchises granted, without the consent of the State or of all the stockholders.*
4. *That they have power, by consent of the States and of a majority of the stockholders, or of any other proportion required by law, to sell or lease or otherwise dispose of these works, or to abandon them.*
5. *That a lease made by virtue of such authority is within the power delegated to the directors, and that there is in their charters no express or implied contract violated by it, and therefore the act authorizing it is not unconstitutional.*
6. *That the purpose for which these works are leased—the benefit and advantage of extended public highways, controlled and operated by one head, for regular and easy communication from and through New Jersey and other States—is evidently a public use for which property may be taken on compensation.*
7. *That even if the Directors have not power to lease for a term, so as to bind the stockholders or their successors, that the leasing and delivering the works to the lessees with a stipulation and obligation to have the shares of dissenting stockholders valued and paid for, is not taking property without first making compensation.*
8. *That the Pennsylvania Railroad Company, the proposed lessee, has, by its charter and supplements, and the public laws of Pennsylvania, as construed by the courts of that State, power to take this lease and bind itself to all its stipulations.*

ZABRISKIE, CH.—The complainants in this case are stockholders in the three corporations who are the defendants. The object of the bill is to restrain these corporations from executing a contemplated contract with the Pennsylvania Railroad Company, by which the works of the defendants are to be leased to that Company for 999 years, for an annual rent of 10 per cent. on the amount of their capital stock. The matter before the Court is an application for a preliminary injunction.

The aggregate capital stock of the three defendants consists of 189,904 shares of \$100 each, of which the 21 complainants own 3,455 shares, being a little more than one-fifty-fifth of the whole. The bill is



filed for the benefit of the complainants and all other stockholders of the defendants who may join therein.

The defendants are the Delaware & Raritan Canal Company, the Camden & Amboy Railroad Company, and the New Jersey Railroad & Transportation Company, all incorporated by special charters, the first two by charters passed Feb. 4, 1830. They were consolidated by an act passed Feb. 15, 1831, and have since been commonly known by the appellation of the Joint Companies. In their business affairs and in legal proceedings, the joint name was retained and their affairs were managed by a joint board composed of the directors elected by each company according to its charter. The charter of the New Jersey Railroad Company was passed March 7, 1832, and it was consolidated with the joint companies by virtue of an act of the Legislature authorizing it, passed February 27, 1867, confirming an agreement made on the first day of that month. By this they were only consolidated in interest, the stock and corporate existence of each remaining as before, but were governed by a joint board, composed of the directors of all. They have since been commonly known by the name of the United Companies of New Jersey, but have not adopted or assumed a corporate name for the consolidated companies, as authorized by the act. The Canal Company was authorized to construct a canal from the Delaware to the Raritan, and a feeder to supply it with water from the Delaware. The Camden & Amboy Railroad Company were authorized to construct a railroad from the Delaware, opposite Philadelphia, to Raritan Bay, with steamboats at both extremities to convey passengers and freight from the city of New York to the city of Philadelphia, so as to "perfect a complete line of communication from Philadelphia to New York." It was authorized after the main road was completed to construct a lateral road from the main road to the Delaware at Bordentown. The New Jersey Railroad Company were authorized to construct a railroad from some point in the city of New Brunswick to the Hudson River, opposite the city of New York, with power to construct a branch to any ferry on that river opposite the city.

In the act of 1831, to consolidate the joint companies, it was provided that any stockholder of either, who dissented, should be paid back the price of his stock with interest—neither work being then constructed. And in the act of 1867, to consolidate the United Companies, it was provided that each dissenting stockholder should be paid the value of his stock, to be appraised by Commissioners.

The joint companies, by an act passed March 15, 1837, were authorized to construct a railroad from the south-westerly end of the New Jersey Railroad in the city of New Brunswick to Trenton, and thence to connect with their road at, or south of, Bordentown, with a spur to the Trenton Delaware Bridge. This act made no provision for dissentient stockholders. In 1835, the joint companies, by an agreement with the Trenton Delaware Bridge Company, of which they owned a majority of the stock, were allowed to lay rails upon the bridge over the Delaware, at Trenton, and to use it for their trains. And in 1836, they made an agreement with the Philadelphia and Trenton Railroad Company, whose road ran from the west end of that bridge to Philadelphia, by which that road was used as part of the line of the joint companies to Philadelphia, and by which the clear profits of these three companies should be divided among all the stockholders, share and share alike.

The joint companies constructed a canal from the Delaware to the Hudson, a railroad from Camden through Bordentown to South Amboy, and provided steamboats at either end, to New York and Philadelphia, so as to make a complete line of communication from one city to the other, and also a railroad from the western extremity of the New Jersey Railroad in New Brunswick through Trenton to Bordentown, with a spur to the Trenton Bridge, and laid rails on that bridge to connect with the Philadelphia & Trenton Railroad. The New Jersey Company constructed its road from the west boundary of New Brunswick to the Hudson, at Jersey City, near the ferry of the Jersey associates, but did not construct a branch to any other ferry. These works were all completed as required by the acts authorizing them.

In this manner, beside the canal from the Delaware to the Raritan, three complete lines of communication between New York and Philadelphia were perfected. One from New York to Amboy by steamboat, from Amboy to Camden by rail, and from Camden to Philadelphia by steamboat. The second from Jersey City, through Newark and New Brunswick, to Trenton, and over the Trenton Bridge and the Trenton & Philadelphia Railroad into Philadelphia. And the third by using the second to Trenton, then by the road from Trenton to Bordentown, and passing over the first, thence to Philadelphia. Each of these lines was a continuous line from New York to Philadelphia.

Each of these companies had, with the authority of the Legisla-

ture, but without the express assent of its stockholders, varied and changed its located route, and constructed branches not authorized by its original charter. And had purchased stock of other corporations deemed auxiliary to its own, guaranteed their bonds, and leased their works; each had established and maintained a ferry at the termination of its road over the Hudson and Delaware respectively, not for its own passengers merely, but for the public. And for this purpose the New Jersey Railroad Company had purchased, at the cost of nearly \$500,000, the capital stock of the Jersey Associates. These things were done sometimes with, sometimes without, special authority of the Legislature, always without the express assent of the stockholders.

These lines were the only canal and railroad routes authorized by the State by which passengers and freight coming to Philadelphia from the West could cross the State to New York. The Pennsylvania Railroad Company owns or controls the railroads which are the chief means of communication from the Western States, including California, to Philadelphia. This company made an agreement with the joint companies, in 1863, by which freight and passengers coming over its road, and the roads controlled by that company to Philadelphia, should be carried to New York over the roads of the joint companies, without change of cars, and the fare and freight received should be divided according to the distance passed over the respective lines.

The depot and other terminus accommodations at Jersey City, barely sufficient for the proper business of the united companies, were found inadequate for the freight business from the West which was coming over the Pennsylvania Railroad. The united companies, to provide for this need, in the autumn of 1867, purchased of the owners the Harsimus Cove property of Jersey City, extending from South Second St. to South Seventh St., giving them a front of 1,300 feet on the Hudson, opposite New York, and containing about seventy acres. This purchase was made at the cost of nearly a half million of dollars, without any special authority from the Legislature, and without any express assent of the stockholders.

By virtue of an act approved March 30, 1838, the right of the State to the lands in this purchase, with the right of reclaiming lands under water, was conveyed to the united companies for the price of \$500,000. This act authorized them to construct a branch road from this property to the New Jersey Railroad, at Bergen Hill. To this

### *Recent American Decisions.*

act the assent of the stockholders was not required or obtained. And, as is alleged, the united companies have expended about \$600,000 in procuring the right of way for the branch so authorized by this act, and the improvement of this property for use will require several millions more.

By an agreement made between the joint companies and the Pennsylvania Railroad Company, in 1863, that Company agreed to construct, and did construct, a railroad, called the connecting road, from the Philadelphia and Trenton Railroad at Frankfort, to its own road at Mantua. By this a continuous and connected line of railroad was completed from Jersey City to Pittsburg, and further West, so that passengers and freight could be transported from Jersey City, and also from Amboy, in the same cars in which they were there placed, to Pittsburg. The Pennsylvania Railroad had a branch road to the Delaware at the foot of Washington street, in Philadelphia; and the joint companies connect with it there by a ferry from the terminus of their railroad at Camden.

In this situation of their works, connections, and contracts, the defendants, jointly with the Philadelphia and Trenton Railroad Company, agreed with the Pennsylvania Railroad Company to enter into the proposed contract with that Company. The terms of the contract had been settled and agreed upon, and the joint board of the directors of the united companies has, by resolution entered on its minutes, directed its execution. By that contract the canal, railroads, and all the other property, real and personal, and the franchises of the united companies, and the Philadelphia and Trenton Railroad Company, are leased to the Pennsylvania Railroad Company, for 999 years, for the annual rent of \$1,948,500, being ten per cent. on the capital stock of the united companies, and the 4,946 shares of the capital stock of the Philadelphia and Trenton Railroad Company, not held by the joint companies, and so not represented by their capital. The lessee agrees to assume and perform all the duties, obligations, contracts, and liabilities of the lessors, and to save them harmless from all existing or future claims. The lessors agree to furnish the lessee with 22,250 shares of their capital stock and mortgage bonds, on an executed mortgage for \$20,000,000, to the extent of about \$4,000,000 more than is required to pay their debts now maturing, such stock and excess of bonds to be used in the improvement and development of Harsimus Cove, and to be advanced in installments after the amount of the installment had been expended. The

lessee is to keep the works in repair, and the contract contains a clause for re-entry upon non-performance of any stipulation by the lessee, and that thereupon its estate and interest shall cease and be void. An act approved March 17, 1870, is relied on as giving power to make this contract.

The act of 1870 declares "that it shall be lawful for the united companies, by and with the consent of two-thirds of the stockholders of each, to consolidate their respective capital stocks, or to consolidate with any other railroad, or canal company or companies, in this State or otherwise, with which they are or may be identified in interest, or whose works shall form with their own, connected or continuous lines; or to make such other arrangements for connection or consolidation of business with any such company or companies by agreement, contract, lease, or otherwise, as to the Directors of said united companies shall seem expedient." It provided that any stockholder who should be dissatisfied with such arrangements, and should give notice of his dissatisfaction within three months after it should be made, should be paid the full value of his stock, to be appraised by commissioners appointed for the purpose.

To entitle a party to protection by injunction, it must clearly appear that he has some right which is about to be violated, as well as that the threatened injury is irreparable or can not be adequately compensated for by suits in the law courts. The right of the complainants claimed here is the right to have the works of the defendants remain under the present management, without being leased or transferred to any person or corporation, at a fixed rent, instead of the possible profits to be made by the management of the Directors. The right of the complainants to their stock is not disputed. The only question is whether this gives them the right to control the action of the Directors and the majority of the stockholders in such disposition of the works and franchises. It is contended that the act of 1870 does not authorize this lease, and that if it gives any authority in this case this lease extends to objects not within it.

It may be considered as settled that a corporation can not lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority.

*Beman vs. Rufford*, 1 Sim. N. S., 550; *Johnson vs. B. R. Co.*, 3 De Gex, McN. and G., 914; *Shrewsbury and Birmingham R. R. Co. vs. North-Western R. R. Co.*, 6 H. L. C., 131; *South Yorkshire R. R. Co. vs. Gr. North-Western R. R. Co.*, 3 De Gex, McN. and G.,

576; *Michigan and Birkenhead R. R. Co.*, 5 De Gex and Sn., 562; *Great Midland R. R. Co. vs. Eastern Counties R. R. Co.*, 9 Hare, 306; *Troy and Rutland Railroad Co. vs. Kerr*, 14 Barb. 601; *Ohio and Miss. Railroad vs. Ind. and Cin. Railroad*, 14 Am. Law Reg., 733; *Lenman vs. Leb. Val. Railroad*, 6 Casey 42; *York and Md. Railroad vs. Winans*, 17 How., 39; *Com. vs. Smith*, 10 Allen, 455; *Richards vs. Libby*, 11 Allen, 66.

This rule is founded on reason and principle, the franchises granted by the State are often parts of the sovereign power delegated to a subject, and always privileges to which other citizens are not entitled. In these grants the State is supposed to regard the character of the grantee, or the guards and restrictions placed upon the corporation, when the grant is by a charter to persons continually changing by transfer of stock. In this case the franchise of maintaining a canal and railroads across public highways and navigable rivers, of taking tolls and rates of fare fixed by themselves without control, are with others, a material part of the property leased; these can not be leased or alienated without consent of the State.

The act of 1870 clearly grants the power to the United Companies to consolidate their own capital stocks, and to consolidate their stocks or business with any other connecting railroad in the State; but it is contended that it does not authorize such consolidation or connection of business with any corporation of another State. The question depends upon the meaning and effect of the word "otherwise." This is certainly an inapt word to designate companies out of the State by being placed in opposition to the words "in this State." It is inapt because its proper use is to express difference of means and manner, and not of place. The word is used here in a way that admits of no change of place in the sentence, even if such change can ever be permitted. "Companies *in this State*" are one subject of the provision, the word *or* plainly denotes that some other subject is to be indicated. If the word elsewhere or otherwise, had been used, it would have appropriately expressed the meaning intended. The radical meaning of the word *otherwise*, which is always a relative word, is different from that to which it relates; and the phrase to which it relates in this case, both from location and sense, is clearly the words "in this State." It means companies different from or other than companies in this State. This is the meaning that I think would strike every one upon the first reading of the sentence; but any one conversant with the correct use of language would be struck with the inappro-



priateness of this word to express the meaning. It is a case of bad grammar, and not of doubtful meaning. The maxim "*mala grammatica non vitiat chartam*," applies to statutes as well as to deeds. If a statute provided "That if any father or mother should chastise a child so as to maim it, he or *her* so doing should be guilty of a felony," a guilty mother would hardly escape on the ground that the word *her*, by which alone she was included, could not be applied to "be guilty," because the rules of grammatical construction and the settled use of language forbid it. Something was intended by the use of this word, and the settled rule of construction requires that no part of a statute shall be disregarded if any effect can be given to it: *Den. vs. Dubois*, 1 Harr., 293. And where the intention of the Legislature is plain, the words of the statute must be construed according to that intention. No one can read this statute, either in a cursory manner or with deliberation and repeated reading, without being convinced that such was the intention, and that the words used express it, although awkwardly, inappropriately, and ungrammatically.

It is a rule of construction, that all grants from the State, and grants of franchises and exemptions in charters, must be construed strictly and most strongly in favor of the public, and against the grant. The object is to protect the public against improvident grants, and grants made by implication without clear intention. And such grant will not be sustained by doubtful words. Ambiguity in such grant vitiates it. But this rule is qualified by another—that such grant and the statute making it must receive a reasonable construction, and not be so construed as to defeat the intention of the Legislature, and that the ambiguity must be such as is not removed by the settled rules of construction.

1 Sedgw. on Stat., 259 and 327; 3 Dutch, 523, *State vs. Newark*; 3 Dutch, 76, *Wright vs. Carter*; 2 Zab., 644, *Briggs case*; *Bridge Proprietors vs. Hoboken*, 2 Deas., 81; *Del. and Rar. Canal Co. vs. Rar. and Del. B. R. R. Co.*, 1 C. E. Green, 372; *Richmond R. R. Co. vs. Louise R. R. Co.*, 13 How., 81; *Perrine vs. Ches. and Del. Canal Co.*, 9 How., 172; *Pennock vs. Coe*, 23 How., 132; *Rice vs. Railroad Co.*, 1 Black, 380; *Phil. and Erie Railroad Co. vs. Catawissa Railroad Co.*, 53 Penn., 62 and 68.

This act can hardly be considered a grant from the State, or to fall within the reason of the rule requiring strict construction in all such grants. The State here parts with no property, and creates no



new privilege or franchise that can affect the public. It simply permits a new arrangement or contract as to privilege and franchises already granted. It enlarges none. It clearly allows such arrangement with companies in this State, and the only question is whether it shall be allowed with like companies of another State.

It is also urged that the Pennsylvania Company is not within the purview of the act; because their works do not form connected or continuous lines with the works of the defendants. I think that the lines are both continuous and connected. The works of the Camden and Amboy Railroad Company extend from New York to Philadelphia. It was so held in the *Briggs case*, 2 Zab., 623, and the *Delaware and Raritan Canal Company vs. the Delaware and Raritan Bay Railroad Company*, 1 C. E. Green, 531 and 3 do., 546. They extend to the foot of Washington street at Philadelphia to the railroad of the Pennsylvania Railroad Company. Thus their works, though not their railroads, form a continuous line. The road of the Camden and Amboy Company at Trenton, is *connected* at Trenton, is *connected* by three intervening roads with the Pennsylvania Railroad. They are not continuous; that implies without interval or interruption. Railroads can be connected either directly or by intervening roads. The provisions of the acts of Pennsylvania show this; their phrase is, "connected directly or by intervening roads." In either way they are connected, if directly connected they are also continuous. And the fact that this act uses the word connected after continuous, for the obvious purpose of adding something to the extent of the provision shows that the intention was to include roads connected not directly, but by some intervening or connecting road.

It is also urged that the means proposed are beyond the powers in the statute; that the authority is to lease, but that the proposed lease for 999 years is, in reality and substance, a sale, though in name a lease. This term is, no doubt, practically equivalent to the fee, but it differs radically from a sale, because it is for rent reserved during the term, with power of re-entry. The distinguishing feature of a sale is that it is for a consideration paid, and extinguishes all right to the property. This is, in substance, as well as in form, a lease. The act of 1870 is, in my opinion, authority by the State to make the proposed contract and lease. The complainants further insist that even if the act authorizes the making of this contract, as far as the State is concerned; yet that against them it is invalid, as it impairs the obligation of a contract existing between them and the de-

fendants, arising out of the charters and their subscription to the stock; this contract they claim to be, that the roads and canal shall be maintained and operated by directors chosen by the stockholders for their benefit, and the whole net profits divided among them as dividends; and that this contract continues without limit of time, unless every stockholder shall consent to change or terminate it. It is settled that a charter without reservation of the power of repeal, is a contract between the State and the corporators, which can not be altered without their consent. It is also settled by many decisions that a corporation can not use the capital stock of the company for any enterprise substantially different from that authorized by the charter, as the stock is subscribed and paid in for that purpose, and that only, which raises a contract not to apply it to any other; and that when persons enter into partnership or become incorporated for a specified object or business, and the articles or charter stipulate that the business is to be continued for a time specified, that the business can not be abandoned within that time except by the consent of all the partners or stockholders.

See *Zabriskie vs. Hack. & N. Y. Railroad Co.*, 3 C. E. Green, 178, and the authorities there cited.

There is no case that holds that a majority of corporators where a time is not specified for which the enterprise must be continued, may not abandon the enterprise, and sell out the property of the company. The dictum of Parker Master, in *Kean vs. Johnston*, 1 Stockt., 413, is the only authority which I find in support of the doctrine. The dictum in my own opinion, in *Zabriskie vs. The Hack. R. R. Co.*, 3 C. E. Green, 193, that a single stockholder can prevent all others from changing or abandoning the work, must be taken with the qualification annexed to it in the former part of that opinion, p. 183—that is, “where they become members of a corporation for definite purposes, specified in their charter, and for a time settled by it.” The case of *Natusch vs. Irving*, cited in *Kean vs. Johnston*, does not support the position. The complainant there held a life policy in a life insurance company, by which he became a member. This was a contract that the company should continue until his death. Lord Eldon held that they could not add marine insurance to the business against his will, while the partnership continued, nor compel him to retire, by indemnifying him or by valuing his policy and paying it off. Nor does the opinion of Chancellor Kent, in *Livingston vs. Lynch*, 4 J. C. R., 573, sustain it. There the partnership was stipu-

lated to continue as long as Fulton's exclusive right continued, and it was held that a majority could not change the essential provisions of the articles of partnership. Gough and Angell, in the section referred to, and *Binney's Case*, 3 Bland., ch. 142, simply state that there is little doubt that a court of equity, in a proper case made, would restrain the disposition of the property of a corporation for other than corporate purposes. This refers to a disposition of the whole property, during the continuance of a corporation, and not to an abandonment of the enterprise by the vote of a majority. The reasoning of all these authorities is based upon the law of partnership; by that law, when there is no definite time fixed for the duration of a partnership, it is a partnership at will, and may be ended by any partner at his will.

Story on Partnership, §§ 269 and 370, Collyn B. r., ch. 2, §2. And this was the doctrine of the civil law. Pothier Pand. Lib. 17, til. v. n. 64; 1 Domat Civ. Law, §§ 802 and 803.

Being incorporated for a specified object without any specified time for the continuance of the business is no contract to continue it forever, any more than articles of partnership without stipulation as to time. There is no reason why it should be construed into such a contract. Such is not implied by the charter. And a doctrine that all the stockholders but one may be compelled to continue a business which they find undesirable and unprofitable, and wish to abandon, is so unreasonable, and unjust, that it will not be held to arise by implication, unless that implication is a necessary one.

The Supreme Court of Pennsylvania, held in *Lauman vs. The Lebanon Valley R. R. Co.*, (30 Penn., C. Casey, 142,) that private corporations can, by a vote of the majority, abandon their enterprise, and sell their property, and that such sale violates no contract. In their opinion they say, "If there has been anything in the relation existing between the corporation and its members that prevents a sale, then a more serious difficulty is presented. For if there is, it must be a part of the contract of association, and can not be changed by the Legislature. But is there?"

"The Charter contains the terms of the contract, and in it we discover no provision of this kind. Can we regard it as implied or involved in the nature of such a contract? We do not think so, for property in itself is essentially alienable, and the right of alienation is essential to complete ownership."

The Court further hold that a dissenting stockholder can not be

forced into a new enterprise or to take, as compensation for his shares, stock in a new company or a company into which the old one is consolidated. They hold that there are two contracts, one with the Legislature, which it can dispense with, the other between the stockholders as to what object they will enter into, and that this can not be altered by the Legislature. They say, "It is the nature of his contract with his associates by which, under legislative authority, they constitute themselves into a corporation, that it is dissoluble, and that upon its dissolution the rights and property shall be distributed among the members;" and, again, "a railway corporation may by legislative consent abandon its franchises as conservators of a highway."

In that case the Legislature had omitted to provide any compensation for shareholders, except the stockholders of the new company supposing the change so beneficial that none would dissent. Yet the Court held that the change might be made by the directors, upon giving security to dissenting stockholders, to pay them the value of their stock, to be appraised by commissioners.

In *Gratz vs. Pennsylvania Railroad Company, and Sunbury and Erie Railroad Company*, in the same court, the complainant, who was a stockholder in both companies, applied for an injunction against the lease of the road and franchises of one company to the other for nine hundred and ninety-nine years, a lease authorized by the Legislature. The Court held that both corporations had the power without the consent of all the stockholders.

In the *Commonwealth vs. Atlantic and Great Western Railroad Company*, (53 Penn. R. R., 9,) on an information by the Attorney General in nature of *quo warranto*, the same Court held that a corporation created by consolidating two corporations of New York with one of Ohio and one of Pennsylvania into a new corporation, with the consent of two-thirds of the stockholders of each, according to the provisions of a statute of Pennsylvania, constituted a lawful corporation.

In *Treadwell vs. Salisbury Man. Co.*, 7 Gray, 393, it was held by the Supreme Court of Massachusetts that a private incorporation by a vote of the majority, may abandon the business of the corporation and sell out their property. The doubt expressed whether a corporation for a quasi-public purpose could do this, and whether the State by *mandamus* could not compel them to continue their business, does not apply to a case where the State has authorized it.

Such a radical change as the abandonment of business can not generally be effected by directors; their duty in most charters is to manage and conduct the business. It requires the action of the corporators themselves. In corporations where there is no provision to the contrary in the charter, the rule is that the majority governs. The assent of all is therefore not required: *Grant on Corp.*, 63, A. and A., sec. 499.

The Legislature, as sovereign, can prescribe laws which shall govern corporations where there is no contract in their charters to exempt them; it can direct that a majority of members, or two-thirds in interest, shall control. If it can do this by general law, it can by special act. The Act of 1870 does that in this case.

But because the corporators may, with the consent of the State, by the vote of a majority, or two-thirds in interest, abandon their enterprise, sell out their property, and return his share of the proceeds to each stockholder, it does not follow that by the same authority the works may be leased to be carried on and conducted by others, the corporation continuing to exist. The right to elect the directors by whom the business is to be managed is a provision in the charter which the State or a majority can not interfere with; it is a contract. The true question on that point here is, whether the making of this lease and contract is an exercise of the power of managing the business and concerns of the corporation conferred in the charter, such as can be used by consent of the legal majority of corporators without that of all.

Such directors have power to make contracts binding beyond their term of office, power to commute fares, and to do so for a fixed period; it is a power constantly exercised. They contract with Express companies and other railroads for the use of their roads for a term of years, at a stipulated price; such contracts are universally admitted to be valid, if permitted by the State. These roads are public highways, on which any citizen or corporation of Pennsylvania has a right to travel and run trains. The State can not prohibit this as long as they are public highways, much less can the defendants. There is no reason why the directors should not make a contract with any one for a term of years, that he might have the use of these roads for a stipulated price, nor why part of that price should not be the keeping the works in repair, and paying all dues and taxes. I see no reason why the directors, the officers who are authorized by the charter to conduct the whole business and manage the affairs of

the corporation, should not exercise that power by leasing the works to others obligated properly to perform all the duties of the corporation in a manner stipulated in the contract, and for such rent or consideration as in their judgment will be beneficial to the corporators, as operating or maintaining the road themselves, or more so. This authority as to the stockholders must be founded on the provisions of the charter, and not upon a special authority from the State, which is required only to bind the State. No court of law in this State, or in any other State, so far as I know, has determined that the directors have not such power, if exercised with the consent of a majority of the stockholders. It has never been held that there is an implied contract in the charters, that the directors of such corporation shall not exercise their power in this manner. On the other hand, it has been held that a Legislature clothed with the power of making and changing the laws, clearly including the power and duty to levy taxes and provide highways, may, by stipulations in charter and other laws, deprive themselves and their successors of the power of levying taxes on any portion of property in the State, and of making roads in any part, and of course in the whole of its territory; and this must now be regarded as law until wise counsels still cherished prevail: 11 Wallace, 441, *Washington University vs. Rouse*. And this under constitutions which provide that the law-making power shall be vested in representatives elected yearly by the people. If this can be done, much more may the directors of a corporation so exercise their powers especially by the actual consent of a majority of the corporators, which in that case is equivalent to a change of Constitution in a State by a majority of the whole people. Whatever view may be taken at law, such power seems equitable, as the owners of two-thirds of the stock have power by contracts for proxies or other means to pledge their stock to vote for directors, who would from year to year, renew and continue such contracts.

Over much, if not the most of the property to be transferred by this lease, the directors have absolute control. They can dispose of it without the consent of the State or the stockholders. Of this class are the lands and real estate held not needed for sustaining their proper works; all moneys and securities for moneys invested; all shares of stock in other corporations, and all leases of other works or roads. It has been questioned whether the defendants had power to take or hold such stocks or leases, even with consent of the State, and whether all these acquisitions were not *ultra vires*. But the charter



of each of these corporations gives absolute power of "purchasing, holding and conveying real and personal estate," without limitation, and to make it stronger, if that is possible, in the New Jersey charter the words are "*any* real or personal estate." In each case the last clause of the section grants all rights and powers pertaining to corporate bodies, necessary for the purposes of the act. This limitation can not be annexed to the right of holding property, because the two clauses are separated by other provisions of a different character, and the annexing the qualification to one power and not to the other seems to grant the one as it reads, without the limitation, "*Expressio unius est exclusio alterius*." I know that it has been held in many cases, that the power conferred on corporations is confined to such property as is necessary or convenient for the purpose of the charter; yet these decisions, I apprehend, will be found to be made upon charters containing that limitation. Although the dictum of Potts, J., in *The State vs. Mansfield*, 3 Zab., 510, would seem to apply that construction to these charters. But even if that limitation must be applied by construction to the express words of those charters, yet the application of the principle by the decision in *The State vs. Mansfield* is, that the authority to hold extends to all property that it may be expedient or convenient to hold, the better to effect the purposes of the charter, such as dwelling-houses for employees, though these were not adjudged to be free from taxation, like houses for lock-tenders, car and repair shops, which were necessary or proper for maintaining and operating roads and canals. This construction would include the stock in the Belvidere and other tributary roads, and even the stock of the Jersey associates necessary to obtain the ferry privilege so important to the profitable operation of the New Jersey Road. Unlimited powers of holding any real or personal estate would, in all cases, authorize the directors to purchase and hold such property, when bought in good faith, to promote and further the objects of the corporation, even without the consent of the stockholders. But all such property not expressly authorised to be held by the charter, or necessary for its proper objects, the directors, may dispose of by sale or lease, or in any manner, at their discretion, without the consent of either the stockholders or the State. They may also thus dispose of any cars, locomotives, steamboats, or fuel, provided expressly for their works. They may sell or dispose of their wharves and ferry-landings in New York or Philadelphia, and purchase others, or may discontinue any ferry. They may, and con-



stantly do, lease parts of these, and of their other real estate not needed for present use. They may take up and discontinue any side tracks or stations that are useless; the New Jersey Company took up the third rail on each track to enable the cars of the Erie Railroad to reach the Jersey City Ferry. It sold its branch railroad and bridge at Newark, and the right to occupy part of its road-bed, to the Hoboken Company. These sales and changes were made without consent of the Legislature or the stockholders, and were within the corporate powers. The directors could abandon and take up the second track on the whole route, and sell the rails if it became useless, and a source of loss by decrease of business. They can discontinue any train or trains, and any station, except such as they are bound by their charter or by contract, to continue.

It may be a serious question whether either of the defendants is bound by its original charter either to the State or its stockholders to operate its road. The Canal company is neither bound nor authorized by its charter, expressly nor by possible implication, to run boats on its canal; the Camden & Amboy Company is neither bound nor expressly authorized by its charter to run trains on its road; and, by the rules of strict construction insisted upon by the counsel of complainants, authority to run trains can not be sustained by implication. The implication is very slight. It can not be had from the power to construct and maintain the railroad, any more than the franchise of being a transportation company could be implied to be granted to any turnpike or plank-road company. The word transportation in the name does not imply it, because on the water they were made a transportation company by express enactment; on land a railroad and on water a transportation company. The name was apt. The 11th section, which states the object and confers the power, confers power only to construct the road, not to operate it. The sixteenth section, which provides for tolls and charges for transportation, will be satisfied by tolls on land and transportation on water. And the part that speaks of its use of the road does not necessarily imply the use by running trains, but is satisfied by its being kept in repair and *used* for earning tolls. The eighteenth section, providing against injury to its works, *carriages* and *machines*, raises the very slight implication which may be drawn from the fact that it was contemplated that it might for some purpose own *carriages* and *machines*; certainly no authority is here given to run trains either expressly or by necessary implication, which is insisted

on by the complainants as necessary to confer it. And the presumption against the implication seems strengthened by the fact that in three railroad charters granted in 1831, viz: "The Pat. & Hud. River Road," (P. L., 24) "The Paterson Junction Road," (P. L., 60), and "The Eliz. & Som. Road," (P. L., 80), and in three charters granted in 1832, viz: for "The New Jersey Road," (P. L., 96) "The Paterson & Hackensack Road," (P. L., 121) and the "N. J., Hud. & Del. Road," 133, express authority was given to operate the roads with locomotives and cars, to charge one rate for tolls and another for transportation in the cars of the company. In 1815 a charter was granted to "The New Jersey Railroad Company" to construct a railroad from the Delaware to the Raritan, with a capital of \$500,000. This, with the steam navigation on the Delaware and Raritan, and had it been constructed by the parties interested, would have furnished a direct and expeditious route of communication from Philadelphia to New York, and of transit over this State from all parts of the Union. It was, so far as I have been able to ascertain, the first railroad charter granted in America, and it shows that New Jersey has always been foremost in works of public improvement, and willing not only to permit, but to provide for the passage of all across her territory. This act provided in its tenth section for rates and charges for transportation of merchandise and products and tolls for all persons using or traveling on the road. But no other or express power for running trains was given. The implication is a little stronger in this than the other. Yet either act may be read and fairly construed as merely authorizing the construction of a road to be used only by the public with their own carriages, horses, and motive power like a turnpike or plank-road.

Yet no one can doubt but that in both these cases both the Legislature and the corporators supposed that the right to operate these roads was granted by these charters. The first charter was granted at the session of the Legislature next after George Stephenson in 1814, placed his first locomotive on the Killingworth Railroad, and succeeded by surface traction in drawing a load of 14 tons six miles per hour. The other was granted at the session next after his famous engine, The Rocket, the father and prototype of our present improved locomotives, was put in successful operation at the opening of the Liverpool & Manchester Railroad, in 1829. It had attained its fastest speed of 29 miles unloaded, and with a load of 50 tons, 14 miles an hour. These roads were both projected, at least in part, for loco-

motives, and probably the projectors intended that these engines should be run by the corporations.

But, although thus the conclusion may be arrived at with some difficulty that this corporation was authorized by the charter to equip and operate its road, there is clearly, neither by express enactment nor implication, any obligation to the State or contract with its stockholders to do this; and that contract, and not the power to do it, is the question now under consideration.

In the charter of the New Jersey Railroad Company there is clear and express power to equip and implied power to operate the road granted in the 16th section. But neither this section nor any other part of the charter makes it obligatory. It is compelled to construct and maintain the road under pain of forfeiture of the charter. This act declares the road a public highway, and provides for the use by the public, limits the amount of tolls to be charged, and directs toll-boards to be put up at the toll gate. The duty of the company to the public would be fulfilled by constructing and maintaining the road. This power, like the power to construct branches, to erect dams and dykes, and every other mere power granted by the words "it may be lawful," or "it shall have power," may be exercised or not at the discretion of the directors. If such corporations provided omnibuses, waiting-rooms and lunch-rooms, for the accommodation of travelers, or baggage wagons, trucks, and store-rooms for baggage and freight, which they have power by implication to do, they can change or abolish them at pleasure if they become unnecessary, or the directors are of opinion that these conveniences will be better furnished by others. The directors of these companies have power to discontinue any train, or half the number of trains run, and to reduce the fares and rates of freight, although, in the opinion of the stockholders, and in fact, these changes may be injurious to the interest of the company. The stockholders have no right to require the directors to exercise to its fullest extent, or at all, any discretionary power conferred by the charter.

If these principles are correct, the defendants, by their directors, have the power to discontinue operating the roads, and to sell and dispose of all their equipment or plant. And the only question that remains is whether they can by lease delegate the power and duty to keep the road in repair, with the right to operate it, to another corporation for a consideration which in their opinion, is adequate and

beneficial to the stockholders. I am of opinion, for the reasons above stated, that they have such power.

As before observed, there is no decision against such power to lease; and there are many instances in this State in which such leases have been made and approved by the Legislature. They have been made by corporations, the management of whose affairs was by the charter intrusted to directors elected from year to year, as in this case. The Paterson and the Ramapo Roads were thus both leased to the New-York & Erie Company; the Warren Railroad, and the Morris & Essex Railroad were both thus leased to the Delaware, Lackawanna & Western Railroad Company; the Morris Canal to the Lehigh Valley Railroad; the Pemberton & Hightstown Railroad, and the Camden & Burlington Railroad were severally leased to the joint companies. None of these leases received the assent of all the stockholders, and they were all authorized or sanctioned by the Legislature without such assent. These leases were unquestionably made with the advice of the most eminent counsel in the State, and their validity has never been questioned by any one in the courts, but they are both matters of great weight, and to be regarded in considering the question, especially in a Court of Equity on a motion for preliminary injunction, where the question is, as this, merely a question of law, and has never been settled by the law courts, and the right to relief depends upon it.

But if I am right in the conclusion arrived at above, that the majority of corporators, under a charter which specifies no definite time for its continuance, have a right to abandon the undertaking, and dispose of and divide the property, the proceeding in this case is valid as against the complainants, as a lawful way of accomplishing that end as to them. Two-thirds of these corporators have determined that they do not desire to go on with these enterprises under the charters, and that they wish to abandon them, and are willing to accept as their share of the corporate property a yearly rent or annuity secured by provisions like that contained in this proposed lease. Some stockholders are not willing; and although the majority can effect the abandonment, they can not compel the dissentients to accept like compensation for their stock, it might be compelling them to embark their capital in a new enterprise. Provision is therefore made to pay or return to them the full value of their share of the whole property of the corporation. This is all they would have if the works were

sold out. The provision is a most equitable one, and without it the transaction, even if valid and legal, would not be equitable and just.

In arriving at this conclusion, I do not change or modify any of the positions laid down in the case of *Zabriskie vs. Hackensack and New York Railroad*, except so far as the correction of an inadvertent expression, heretofore noticed, is concerned; on the contrary, I reaffirm them all as founded upon established principles that can not be changed consistently with good faith and justice. Capital contributed for one purpose, under a charter declaring that purpose, can never be applied to one substantially different without consent. I hold that a charter which declared that the undertaking should be prosecuted for a definite time, is a contract for that time, and binds all to continue it. But that, on the other hand, a charter that states no such definite time, like a partnership made in that manner, can be abandoned by a majority; that there is no contract which prevents it; that the will of the majority, which is the law of corporations, must govern. And if there were no such law, that, like all other law, it may at any time be enacted or changed by the Legislature, who may declare that a majority or two-thirds of the stock or of the corporators shall govern. Of course, such law would not affect corporations with irrepealable charters declaring a different rule.

Again, the defendants contend that the lease and the act authorizing it must be sustained, on the ground that this property is taken for public use, and that compensation is provided. The complainants deny that this is taken for a public use, and argue that the act provides for compensation only after the taking, and is therefore void by the Constitution of the State.

The property of a corporation, such as bridges, turnpikes and race-roads, with its franchises, are property, and as such are subject to the power of eminent domain, and may be taken, upon compensation, for public use. Any other corporation could be thus authorized to take the whole or any part of the roads of the defendants. Highways, whether by railroad, canal, turnpike roads or common roads, are for the public use. It is one of the functions and duties of government to provide them. This is a duty recognized in all civilized nations, from time immemorial. The absolute duty is only to the subjects or citizens of the nation or State. But among modern nations, by comity, neighboring countries are always permitted to use their highways; and railroads and other highways are often constructed to accommodate the inhabitants of such countries in passing to and

through them. These roads are built by the sovereign power, and for a public use; and in these United States, bound together in one country, with many common interests, and in which the citizens of many States can only reach other States, or the seaboard, the harbors and marts of commerce, by crossing intervening States, the construction of highways for such purpose, although only required by comity, is for a public use. The law, unquestionably, as is laid down by Chief Justice Beasley with so much clearness, in the case of the *Del. & R. Canal Co. vs. The Rar. & Del. R. R. Co.*, 3 C E. Green, 501, that one State can not, as a right, demand that a certain mode of passage shall be provided for her citizens and her property by any other State. Yet, as the Federal Government has not been empowered, and has not yet assumed the power, to construct railroads through States, it seems almost a moral duty or imperfect obligation upon each State, especially one situate as this State is, to provide for passage across it by citizens of sister States. If the State choose to do this, it may; but it is an act done in its sovereign capacity, and the property taken for it is taken for public use. The Camden and Amboy Railroad was constructed across the State for that purpose, and that only. Its termini were the Cities of New York and Philadelphia. The second section of the charter declares its purpose, which was to "perfect a complete line of communication from New York to Philadelphia." It is obliged to provide steamboats at either extremity of the road, to transport passengers and goods from city to city, but not for local passengers or freight. It was not obliged to have depots or stops for passengers or freight at any point in the State; and while the railroad was declared a public road for all who could get their carriages upon it, there was no obligation to provide switches or turnouts anywhere along the line for the accommodation of Jerseymen. Pennsylvania, by an Act of Feb. 16, 1841, provided that the New York and Erie Railroad might pass for about fifteen miles through the north-east corner of the State, and might take land by power of eminent domain. New York authorized the Morris Canal Company, a corporation whose works were wholly in this State, to condemn lands in that State for a reservoir for a feeder for the canal, and it was sanctioned as a proper exercise of eminent domain: *Morris Canal Co. vs. Townsend*, 24 Barb., 658. This State, by the Act of February 21, 1856, P. L. 42, authorized the New York and Erie Railroad Company, a foreign corporation, whose business was to convey passengers and freight from Dunkirk and



other points of New York to New York City, to proceed in their own name to construct a railroad from the Paterson Railroad to a point opposite New York City. The Act gave power to condemn lands, which was acted on, as appears by the case of *Ross vs. Adams*, 4 Dutch., 160, and 1 Vroom., 505, where the dispute was concerning funds in court, the proceeds of lands so condemned. The State of New York authorized the New York and New Haven Railroad Company to extend its road through that State, and take lands by condemnation. But in the present case, the public use does not depend on this alone. The object of consolidating the business of these companies is to facilitate and improve communication all along their line. The large business and manufacturing cities of New Jersey are upon the route of the united companies. Many of these cities constantly receive and send goods and passengers from and to places in the interior of Pennsylvania, Ohio, Illinois and other Western States; if the communication is really improved, which is the object and intent of giving this power, it is a public benefit to the citizens of this State in providing a more convenient highway for their intercourse with the western part of our own country. Taking the roads of these companies for this purpose, is clearly taking them for public use, and for the use of the citizens of this State; it is simply furnishing the proportion of this State for the highway that will be furnished by this union of companies, or one consolidated company, from the Pacific to the Atlantic, for the common use of all the citizens of the nation, including those of New Jersey.

If the defendants and all their stockholders had refused consent, the State could still have authorized the taking of these roads for the purpose contemplated, by condemnation. But the act of 1870 did not provide for this. Its intention was only to allow these roads to be taken if two-thirds of the stockholders should consent. In that case the act intended that the stock or interest of the others who did not consent, should be taken by condemnation. It is only when no bargain can be made with the owner that the power to condemn is usually given. And if the owner of an undivided share, or an estate for years, for life, or in reversion in lands required, consents, his estate need not be condemned, but only the estate of those who do not agree to sell. It is fair and equitable, that such stockholders as prefer to take the arrangement made by their directors for them, a perpetual annuity of 10 per cent. on the par value of their stock, to receiving its actual value as represented by the property should be



permitted to accept such compensation, they could not be compelled to take it. And that the others should receive what the law requires in all cases of condemnation, the money value of their property as compensation. The objection that in this case the defendants and not the Legislature determine that the case is a proper one for the exercise of the power of eminent domain is not founded in fact. There are only a few companies in the State and few out of the State whose works connect with those of the defendants. The Legislature have determined that consolidating business with either or all of these is for public use, and a proper occasion for the exercise of this power.

But the statute only provides for compensation *after* the road is taken. The Constitution, Art. iv., Secs. 7 and 9, provides that "private corporations shall not be authorized to take private property for public use without just compensation *first* made." A like provision was inserted in the act consolidating the United Companies, and in several other statutes of this State enacted since the present Constitution, authorizing like changes. Thus sanctioned by legislative approval, and that of the counsel under whose advice these important transfers have been made, it would seem presumption to treat it as invalid and of no effect, even if that was my opinion.

But it seems to me that the taking intended to be prohibited by the Constitution is an illegal or forcible taking possession, without the consent of the owner. It does not prohibit receiving or accepting by consent of the owner, when the compensation is to be settled afterward. Any one in lawful possession, or having the legal authority to do it, may give possession before compensation. If a tenant for life or years, gives possession of the land and consents to its use, a railroad company may enter under him, and this would not be taking the property of the reversioner. His estate may be taken and condemned when the reversion falls in. Compensation to him must be made, then, before his estate is taken. The Directors of these defendants are in the possession and control of these roads. The roads are not in the possession of the complainants. The corporation, not the complainants, have the title; the stockholders have neither the legal nor equitable title, nor the right to the possession. At the lease the directors will give up the possession of the property. It will not be taken from them. But on the hypothesis that they have not the right to do this as against the complainants, the complainants will have the right to call them to an account in equity as

their *cestui que trusts*, and to compel the lessor to surrender the lease as obtained by a breach of trust in which they were abettors, and compel the Directors to account for the profits which would have accrued but for the breach of trust. Their property in the stock is not taken, impaired or affected by the lease. They can alter it, proceed for any redress to which they were entitled before it. But upon the proceedings prescribed by the act for condemnation being had, and after compensation paid, the stock which was their property, is taken, and their right to any other redress is gone; thus the compensation is first paid before this property is taken.

Here are unsettled questions of constitutional law, proper for the courts of law to determine. Upon them rests the right to this injunction. Were my leaning the other way it would be against the settled rule of equity to grant an injunction upon a doubtful right, where the injury by arresting and possibly defeating a negotiation like this, might be so great and irreparable. Especially in a case where only a little more than one-sixtieth of the stockholders apply, and the rest by their silence acquiesce in, or by their written consent approve of, the proposed contract, and where the act provides for compensation to be made by their own trustees, upon a simple notice that they demand it. The object of courts of equity in interfering where property is taken contrary to the constitutional provision, is to save citizens whose property is taken from the expense and trouble of pursuing at law, strangers who, without legal right, take their lands. Here it is a claim against their partners or trustees. Equity does not relieve by injunction in all cases of violation of constitutional provisions. The Supreme Court of Pennsylvania, in *Mott vs. Pennsylvania Railroad Company*, 6 Casey, 23, refused unanimously a preliminary injunction on this ground, to a stockholder who was offered compensation by the act, and held that his rights were to be determined on the final hearing.

Another question is as to the power of the corporation lessee to enter into the proposed contract; whether they can bind themselves to it, or whether it is not *ultra vires*, and, therefore, all their undertakings void. The position of the defendants' counsel, that this is only a question between them and the State that created them, to be raised by its officers, and in which the complainants have no concern, is not sound. If these directors deliver over to the lessee all this property, and these valuable assets, some of which to the amount of millions, it may take away and convert to its own use, without being

liable on their obligations; this would be such faithless and improvident waste and squandering of the assets of these corporations and corporators as would entitle them to the preventive protection of a court of equity.

That a foreign corporation may own property in this State, and transact business, and make contracts in it to be performed here, is too well settled to discuss. There is no law of this State prohibiting it. The capacity of such foreign corporation to hold property or transact business depends upon the law of the State which credited it. If that gives it power to own, lease, or use, property in another State, it has that capacity. The Pennsylvania acts of Feb. 17, 1870, and May 3, 1871, set forth by the answer, unquestionably gives this authority. This allows of no discussion, and was frankly admitted by the distinguished counsel who closed the argument for the complainants; he only excepted from it the personal property and stocks in other companies, whose railroads do not connect. But that restriction is only as to the roads embraced in the lease; it gives authority to enter into *any other contract with* companies owning connecting roads. This surely will include power to take, with such railroads leased, all property which the lessees hold for the furtherance of the objects of the leased road, as appurtenances to it—charters and situate of a foreign State must be construed here as by the courts of that State. *Am. Print Works vs. Lawrence*, 3 Zab., 590. And it was held in the Supreme Court of Pennsylvania, in *The Philadelphia and Erie Railroad Company vs. The Catawissa Railroad Company*, 53 Penn. R., 20, that a situate authorizing the lease of one railroad by another company authorizes it to lease another railroad leased to the lessor as *appurtenant* to its road. And many decisions of that Court, beside that in Gratz's case, hold leases and purchases made by these lessees without the consent of all the stockholders, to be valid.

Such are State policy and pride, which should not allow these works to be under the control of non-residents or of a foreign corporation. The expediency of permitting an overgrown, gigantic corporation, like another Colossus, to place one foot on our shore, with the other perhaps on the Pacific; that this lease of 999 years may impair or destroy the right of the State to take these works at cost in 1839, and that our citizens may be put to great inconvenience in being compelled to resort to courts of other States for redress of injuries suffered in this: these matters are proper subjects for Con-

sideration of the Legislature only; that has considered and decided. Its action in this case has been in accordance with the policy of the State for years, which has been to permit corporations of other States to lease works in this, and to construct new ones for themselves, under the impression that the expenditure of large sums of money on these works, and the increase of business which they bring here, are a great advantage to the State, the works themselves being constructed and operated by authority of and subject to the laws of the State. This general policy I have no power or inclination to overrule. I need not say whether in this case I think it wisely exercised. Neither is the policy or wisdom of the surrender by the State of its right to take these roads in 1889, at cost, for my consideration. If they were, I can not comprehend how a permission to the defendants to connect or consolidate their own business by contract, lease, or otherwise, could confer power to affect the rights of the State, even without the clear and distinct reservation of these rights contained in this act. This result could not be reached by the most liberal and latitudinarian construction, much less by the rules and strict construction which would most clearly apply. Had the State expressly authorized a lease of all the works for 999 years, the question would have been different.

The question whether the rent in this case is sufficient, and whether greater should not have been required to be paid, is exclusively for the determination of the directors and such stockholders as agree to receive it for their stock. The sufficiency of the security, the mere undertaking of the lessees with the right of re-entry, is for like determination. For property and assets of this amount intrusted to the directors of any corporation, it is not usual to require sureties; they could hardly be obtained. As the charters now stand, the persons who control the corporation lessee by purchasing a bare majority of the stock of the New Jersey corporations, or by the vote of the two-thirds who assent, could be elected directors, and without sureties obtain control of the alleged \$15,000,000 of cash and convertible assets, and appropriate or squander them beyond control of any of those who dissent.

Had my views of the questions above considered been different, my determination of this application must have been the same. It has been for a long time the established rule in Courts of Equity, in matters of preliminary injunction, that where the right of the complainants to which the alleged injury is threatened has never been

established at law, and is not to the Equity Judge clear or free from serious doubt, an injunction will not be granted, but the party will be left to his remedy at law. In some cases where the leaning of the judge is in favor of the right, and the intended injury is great, and if once done can never be fully remedied, the judge in his discretion will, by injunction, retain matters *in statu quo* until the hearing of the cause, or a decision at law. Here the right on which the application is based, the right of a minority of stockholders down to the owner of a single share, to prevent all the others from making, what to them seems, an advantageous disposition of their property, has never been established at law; and were my views in favor of that right, the injury to result from a temporary violation of that right, if the lease should be declared void in the end, is not so great or irreparable as to justify the exercise of that discretion in a case where it would seem so inequitable, where less than one-fiftieth of the stockholders claim to control all the others, and where full compensation is provided. If the interference of this Court should defeat the proposed arrangements, as it might, the loss to the stockholders who consent, of a bargain which they think very advantageous, would from the extent of their interest be far greater than that of the complainants by the refusal to enjoin.

This restriction on their action adopted by courts of equity, has been somewhat extended and definitely settled as the law in this State, by the Court of Errors, by the judgment in the case of *The Morris and Essex Railroad vs. Prudden*, 5 C. E. Green, 530. The Chancellor, in that case, had assumed that Prudden, by purchase of a lot fronting on a street laid down on a map and staked out on the ground, from the owner of the tract so mapped and laid out, was entitled to have the street kept open to its full width, and that the subsequent laying out a public highway over this street and its vacation, both by surveyors of the highways, without compensation, did not affect the right of way. These questions, the Court held, were proper to be determined by the courts of law, and that an injunction ought not to issue except in a strong and mischievous case of pressing necessity, without the right having been previously established at law. And while the opinion in that case admits that the law as to the right of way had been so established in other States, and cites a number of cases to show it, the decision of the Chancellor is reversed for this among other causes, and very consistently, without deigning to review the correctness of his conclusion, although the inference is

hardly questionable that the Court agreed with him in it. This judgment is direct authority for the position that the right of the complainant which he seeks to protect, or the principle of law on which it depends, must have been settled by the courts of law of this State, or the decision of the Court of Equity, even if correct, will be reversed.

There has been no decision on the right of the complainants to prevent a sale or lease of these works by any court of law in this State. None is pretended. The only decision is that of the learned Master who advised the Chancellor in *Kean vs. Johnston*.

In the first place, this is only a dictum, a dictum founded on no precedent, and followed by no court. The case was expressly decided on other grounds. But the Master, whatever his standing and authority as a lawyer, was sitting in a Court of Equity, and not a Court of Law, and, therefore, the authority is not sufficient. This is not only to be inferred from the language of the opinion in Prudden's case, but from the case itself. The Chancellor, in his opinion, relied upon and cited the decision of the Court of Errors in the case of *Holmes vs. Jersey City*, 1 Beas., (2,) 99. In that case Holmes had purchased of Van Vorst a lot laid out on his map, under the same circumstances precisely as Prudden's purchase.

The question was upon the right of the city to close part of the street.

In the opinion of the Court of Errors, delivered by Chief Justice Green, the proposition is stated at the commencement as the foundation of the claim, "that the complainant who purchased under Van Vorst is entitled to the use of the entire street as dedicated." This proposition was at the foundation of the claim of Holmes, without it he had no standing in Court. To this proposition the whole Court assented, both by adopting the opinion and by reversing the judgment of the Chancellor, who did not perhaps, differ with them on this point, but his order dissolving the injunction was correct if Holmes had not this right. Six Judges of the Supreme Court and five Judges of the Court of Errors, also law Judges, concurred in this judgment. But they were sitting not as a court of law, but as a Court of Equity in an appeal from the Chancellor, and therefore it is properly assumed in Prudden's case, that this question had not been determined by a court of law. This must have been the main question, as the other, whether the right was lost by laying out and vacating a highway over the lands in which the easement was, could



extinguish it, is included in that so often declared by the court of law that the vacation of a highway laid out over lands, leaves the title as it was before the laying out. Both questions are included in the opinion in Prudden's case. The opinion of a master sitting in equity could not effect what was not done by the unanimous opinion of a court composed of all the law judges, because, sitting in equity. This doctrine has been since that decision, followed by this Court in many cases, including that of *The Hackensack Improvement Commission vs. The N. J. Midland Railway Co.*, not yet reported.

The doctrine of acquiescence, too, as laid down and applied in Prudden's case, must deprive the complainants of the remedy by preliminary injunction. In that case the road had been located, and a track laid in 1846 and 1847, after Prudden's purchase, on the street in front of his lot, but on the side most distant from his lot. At the laying of the first track, there was nothing to intimate to Prudden that a second track would ever be required, or that the right to lay it was claimed. His only acquiescence was silence. In June, 1848, the highway was vacated by surveyors, and in December, 1848, the owners who laid out the street and sold to Prudden conveyed to the Railroad Company a strip in the street fifty feet wide. These facts appear in the opinion, and the judgment is founded on them. The Court held that this acquiescence in laying the first track deprived him of the right to the protection of an injunction, when the same company attempted to lay another track on the same street, nearer to his lot, that seriously incommoded the access to it over the street. The doctrine of acquiescence had not before been extended, even in injunction cases, beyond the thing or erection acquiesced in, and was not held to protect further encroachments of a like nature upon other parts of the same property, or to justify in equity him "who had been suffered to take my coat in taking my cloak also," as being parcel of my apparel.

In this case the delay of the complainants, in filing their bill until the terms of the contract were fully agreed upon, can not be held to be acquiescence. Until they knew the terms, they could not know that they were not such as might induce them to acquiesce or consent, even if they were not bound. But the acquiescence is their consenting to or acquiescing in former encroachments of the same nature on these very rights by the Legislature and their directors. For the gist of the decision in Prudden's case is, that it need not be an acquiescence in the injury then contemplated, but in a former one touching



the same right. Prudden had never for a moment acquiesced in the laying of the second track; he filed his bill before any work was done. These complainants are in precisely the same situation. Some of them acquiesced in the Act of 1831, consolidating the joint companies; all as expressly alleged in the bill (p. 30, 1.30) assented to, or acquiesced in the act consolidating the United Companies, and the agreement which it confirmed. These matters were, according to the Hackensack and New York Railroad case, greater encroachments on these rights of stockholders than the present lease.

The doctrine of acquiescence settled in Prudden's case must be applied, as it was then applied, only to affect the remedy by injunction. For that purpose, though novel, it may seem equitable. It will never answer nor was it intended to be applied to affect or change rights of property or to claims in the courts of law. Else the owner of a lot with a house removed from the front, if he suffered his neighbor to erect a building encroaching on the lot a few feet or a few inches, would be bound by this, if that neighbor, twenty years afterward, should erect a wing to this building, extending across the lot and cutting off access from the house to the street, more especially if, as in Prudden's case, there was a street by the side or rear from which a gate could be cut, and access had to an entrance to be made in the back side of the house. But such acquiescence must in this case, as in that, deprive the complainant of his remedy by injunction. That decision is the law of this Court until reversed or modified.

These views make it unnecessary for me to consider other questions presented, including that of a want of necessary parties to the suit, so ably urged by the counsel who opened the argument for the defendants.

The injunction must be denied, and the order restraining the defendants from executing the lease vacated. I have arrived at the above conclusion after careful investigation and deliberate reflection. The case itself is of great importance, the principles involved are still more important. I have been much aided by the able and exhaustive arguments of the distinguished counsel concerned in it. Their briefs, especially the full and elaborate brief of the opening counsel, contain a summary of the law upon the subject.

## SUPREME COURT OF TENNESSEE.

[DECEMBER, 1871.]

HARRISON PEPPER & CO. vs. T. J. WILLIS *et al.**Tax upon Law Suits constitutional and valid.*

SNEED, J.—Upon a motion to re-tax the costs in this cause in the Circuit Court of the county of Robertson, the plaintiffs, who were the unsuccessful parties in the litigation, moved to strike out the State tax of five dollars, and the county tax of a like amount, adjudged against them, upon the ground that the statute imposing a tax upon law suits, is unconstitutional and void. The motion was disallowed, and the plaintiffs have appealed in error.

It is insisted that the tax in question is but the imposition of a burthen upon the right of the citizen to go into the courts to have his wrongs redressed, and his rights vindicated, and that the statute which authorizes the tax, is an infraction of that section of our bill of rights, which declares that, “all courts shall be open, and every man for any injuries done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay.” This section of our Bill of Rights is in substance identical with the great principle of English liberty granted by *Magna Charta*, and was borrowed from the 29th chapter of that celebrated instrument, which in its original English version was in the words following: “No freeman shall be taken or imprisoned or disseized from his freehold, or liabilities, or immunities, nor outlawed, nor exiled, nor in any manner destroyed—nor will we come upon him, or send against him, except by a legal judgement of his peers, or the law of the land. We will sell or deny justice to none, nor put off right or justice.” By sections eight and seventeen of our bill of rights, the great guarantees of popular liberty announced in this chapter of *Magna Charta* were recognized, and adopted as a part of the fundamental law of this State—first by the Constitution of 1796, and again by that of 1834, and again by the Constitution of 1870. By the fourth section of the 10th article of the Constitution of 1796, it is provided that “the declaration of rights hereto annexed

is declared to be a part of the Constitution of this State, and shall never be violated on any pretence whatever. And to guard against transgression of the high powers which we have delegated, we declare that every thing in the bill of rights contained, and every other right not hereby delegated, is excepted out of the general powers of government, and shall forever remain inviolate:" Hay.& Cobb, Rev., 406.

A provision of equivalent import is contained in each of our subsequent Constitutions of 1834 and 1870. The first statute imposing a tax upon litigations in this State, was enacted within three years after the adoption of the Constitution of 1796, and by that statute it was provided: that the several clerks and masters of the courts of equity, the clerks of the superior courts of law, and the clerks of the several county courts, shall collect the following taxes for the use of the State, viz: on each suit in equity, two dollars and fifty cents; on each suit in the superior court of law, one dollar and twenty-five cents; on each suit in the county court, sixty-two and a half cents; on each appeal from an inferior to a superior court, or writs of *certiorari*, one dollar; and the taxes in equity, and suits at law, shall be taxed in the execution when the suits are determined: Act 1799, ch. 30, § 1, Hay. & Cobb, Rev., 349.

By the Act of 1817, ch. 138, this Act of 1799, ch. 30, was amended so as to require "the several clerks of circuit and county courts to collect the sum of one dollar on each suit commenced by original writ or attachment, and the same on every suit taken to the circuit court from the county court by appeal or *certiorari*; also, the sum of one dollar on each indictment or presentment, and the sum of fifty cents on each appeal or *certiorari* from before a Justice of the Peace, in addition to the tax already collected by law, which shall be taxed in executions as heretofore:" Hay. & Cobb, Rev., 349. And by the Act of 1827, ch. 49, upon a successful motion by the solicitor, against the clerk or other collector of public taxes, a tax fee was allowed the solicitor, "in case it be collected of defendants:" *Id.*, 362. These several statutes authorizing a tax upon judicial proceedings, were in full force and operation when the convention of 1834 met, and adopted the Constitution of that year, wherein it is declared that, "all laws and ordinances now in force and use in this State, not inconsistent with the Constitution, shall continue in force and use, until they shall expire, be altered or repealed by the Legislature:" Cons. 1834, art. xi., § 1.

The Legislature which assembled next after the adoption of the

Constitution of 1834, recognized and adopted these laws, by re-enacting them with certain changes, in the words following: "each and every person who shall be unsuccessful in any suit in equity, shall pay a tax of two dollars and fifty cents; on each suit in the circuit court, two dollars and twenty-five cents; on each appeal, writ of error, or *certiorari* from the circuit or chancery court to the supreme court, two dollars; on each appeal or writ of *certiorari* from before a Justice of the Peace, one dollar and sixty-two and a half cents; and each indictment or presentment, one dollar: Act 1835, ch. 13, § 4, Car. & Nich., Rev., 604. By a subsequent Act, these taxes were increased as follows: on each suit in law or equity, three dollars and fifty cents; on each petition filed in any of the courts of record for the division and distribution of estates, three dollars and fifty cents; on each appeal, writ of error, or *certiorari* from the circuit or chancery court to the supreme court, three dollars and fifty cents; on each appeal, or *certiorari* from before a Justice of the Peace, two dollars; and on each presentment or indictment, two dollars: Code, § 553; and by section 551 it is provided, that the taxes aforesaid shall be paid by the unsuccessful party in the litigation; and for prosecutions for offenses against the criminal laws, by the party taxed with the costs. By the Act of 1865, ch. 8, these laws were again remodeled, and the tax on each original suit in any of the courts of law or equity, fixed at five dollars. And such was the state of the laws upon this subject when the Convention met in 1870, to re-organize the State government, and when the Constitution of that year was adopted and proclaimed.

By the first section of the Eleventh Article of that instrument, it is ordered that all laws and ordinances now in force and use in this State, not inconsistent with this Constitution, shall continue in force and use until they shall expire or be altered or repealed by the Legislature. We have thus been careful to show the state of the law upon this subject from the foundation of the government to the present hour, and to trace the changes of the organic law, that it may be seen that on at least two memorable occasions in the history of this commonwealth, the people have met in Convention, having similar laws upon the Statute Book, some of which are as old as the State itself, and have re-organized their government without any ordinance or provision which, in express terms, abrogates or reprobates this kind of legislation. While therefore we can not assume that the provisions of the two Constitutions of 1834 and 1870 adopting and

approving the laws then in force, so far as they are not inconsistent with those instruments, give the constitutional sanction to these statutes, yet we must hold these facts to be a persuasive argument which tends to invite, if not justify, such an assumption. It has been well stated at the bar, that time can not consecrate a wrong, and that a statute which violates the organic law, though it has been acquiesced in, as of unquestioned validity, for generations, is not the less an iniquity on account of its years. It, therefore, becomes us to enquire without reference to the antiquity of these laws and the circumstances referred to, which would seem to have forestalled this investigation, whether they are in fact repugnant to the provision of the Constitution, that "the Courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." It may be observed at the threshold, that a relinquishment of the right of taxation is not to be presumed unless expressed in terms too plain to be mistaken: *Jefferson Branch Bank vs. Skelly*, 1 Black R., 430; *Gilman vs. Sheboygan*, 2 Id., 510; *Phil. & Wilmington Railroad Co. vs. Maryland*, 10 How., 376.

The power to tax in a government involves the power to exist. It is the chief and fundamental attribute of sovereignty; and the objects and sources of taxation are in general bounded only by the jurisdiction or territorial limits of the State, and extend to and embrace all privileges, rights, properties and franchises not forbidden in the organic law. It is the condition of citizenship that the enjoyment of all these shall be protected by the Government, if the citizen will pay tribute upon them for his own and the general weal. Thus, said Chancellor Kent, the power of State taxation, is to be measured by the extent of State sovereignty, and this leaves to a State the command of all its resources and the unimpaired power of taxing the people and property of the State: 1 Kent Com., 461. The power of taxation, said Marshall, C. J., is an original principle which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in the government as part of itself. \* \* \* \* However absolute the right of any individual may be, it is still in the nature of that right that it must bear a portion of the public burden, and that portion must be determined by the Legislature. This vital power may be abused, but the interest, wisdom and justice of the representative body and its relations with its constituents, furnish the only security against unjust and excessive taxation, as

well as against unwise taxation. And it is, said he, unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. Vid. *McCulloch vs. Maryland*, 4 Wheat, 428 and 30; *Providence Bank vs. Billings*, 4 Pet., 561. And so it is said in another case, "if the right to impose a tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the State which imposes it, which the will of such State may prescribe:" *Weston vs. Charleston*, 4 Pet., 449; *Bank of Commerce vs. New York City*, 2 Black, 631. It was an observation of Lord Bacon, "that no people overcharged with tribute are fit for empire." And yet the power of taxation in a State could not well be circumscribed without peril to the State itself. This, therefore, being the unquestioned right of every Government to tax everything and to tax without limit, unless the limitation be imposed by the organic law, we must look to the latter to find the restrictions, if any, imposed in this respect upon the legislative department here. We have seen that the laws authorizing a tax upon law suits, to be paid by the unsuccessful party, had their origin soon after the organization of the State government, under the Constitution of 1796, and having existed ever since, they have passed the ordeal of two new Constitutions without express repudiation or disapproval. And it would seem remarkable that a law enforced almost every day in some part of the State, for more than seventy years, and which has brought its thousands and hundreds of thousands of revenue into the State and County treasuries, should have been suffered so long SUB SILENTIA, to oppress the citizens if it be indeed repugnant to the Constitution. And it would seem yet more strange that in the two Conventions which sat to deliberate upon this important question, with these laws before them, the subject of exemptions engaged the attention of both, and the whole instrument is silent upon this subject. We find on the other hand, that all property, real, personal and mixed, and all privileges, shall be taxed without other restrictions than that taxes shall be equal and uniform, that only certain property held by the State, or cities, or towns, and used exclusively for public purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, *may* be exempt, and that by the terms of the Constitution, only one thousand dollars' worth of personalty in the hands of each tax payer, and the direct product of the soil in the hands of the producer or his vendee, *shall* be exempt



from taxation. These two latter, of all the vast resources of the State, are alone expressly exempted from taxation by the terms of the Constitution itself. And among the few which may be exempted at the option of the Legislature, the subject of this present enquiry does not appear. If it be true then, that the laws imposing a tax upon law-suits are incompatible with the seventeenth section of the bill of rights, there must be some marvellous obscurity in that section, since it has escaped the scrutiny of two Conventions, and the vigilance of two generations not distinguished for their indifference to their constitutional rights. We are free to confess that the two able and ingenious arguments submitted at the bar upon this question, in behalf of the plaintiffs, had for a time generated doubts and difficulties to which we were strangers before, but we imagine that these doubts will disappear as this subject is more thoroughly investigated. If we are correct then, in assuming that the power of taxation in a government is an unlimited power except so far as it is limited in the organic law—then the right of entering the courts for the purposes of litigation—whether considered as a species of property, a franchise, or a privilege, is one that can not escape this all-pervading power. “The question,” it is said, “whether a law is void for repugnancy to the Constitution is at all times a question of delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other.” *Potters vs. Dwarr*, 65, 6 Crach, 128. The right to litigate in the courts is a common right, and therefore, it can not be said to be taxable as a privilege. A privilege in the sense of our revenue laws, is a “power granted to an individual or corporation to do something, or to enjoy some advantage which is not of common right.” 2 Meig’s Dig., § 1587; or in the language of this court, it is a license or permission to do that which in general is prohibited: *Mabry vs. Tarver*, 1 Humph., 94 and 98. But the right to litigate one’s rights in the courts is a species of property, an incorporeal property, and all property is taxable in this State.

Property is corporeal or incorporeal. The first, it is said, comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like: 2 Bouv., L. D., 387. But it is said that, in the words of Marshall, C. J., the power to tax



involves the power to destroy, and if the Legislature can tax the law suit at all, they may tax it so heavily as to render the right itself nugatory and of no avail. To this we reply in the words of the same eminent jurist, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the object to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is in general a sufficient security against oppressive and erroneous taxation: *McCulloch vs. Maryland*, 4 Wheat, 428. But it will be observed that the courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law and right and justice, without sale, denial or delay. The promise is not to the man who deals unjustly, who builds his house by unrighteousness, and who defrauds and wrongs his neighbor, but to him who has been injured in his lands, goods or reputation. The tax is imposed upon the "unsuccessful party," who, in the opinion of the tribunal adjudicating the case, is in the wrong; who has *not* been injured in his "lands, goods or reputation," but who has wronged his adversary. And it becomes; therefore, in this view, not a tax upon the judicial remedy, but a tax upon an unrighteous litigation. If indeed the tax were upon the plaintiff as a condition precedent to his litigating his rights in court,—yet no tax could amount to an inhibition upon him as we have our actions *in forma pauperis*, with one or two exceptions, as a remedy in all conceivable cases.

The clause of the constitution now under consideration, was, to some extent, considered and expounded in an early case in this court, in which it was said, "We must understand the meaning to be that, notwithstanding any act of the Legislature to the contrary, every man shall have right and justice without sale, denial or delay. That is to say for the attainment of justice,—the end of law,—right must be administered without sale. Original process must issue without price, except what the law fixes, and without denial, though the defendant be a favourite of the king who interferes in his behalf, and must be proceeded on by judges, after suit instituted upon it, without delay, either of themselves or by order of the king, or as we say, act of the Legislature. And the judges, when the causes, depend must issue the proper judicial process, without fee or reward, except

that fixed by law." This, say the court, is the long fixed, well-known meaning and legal construction of the words "right and justice without sale, denial or delay:" *Townsend vs. Townsend*, 1 Peck, 15, citing 2 Inst., 55, 56. Sullivan, 523, *Id.* 1 Meigs' Dig., § 521. It is in our opinion clear that the law may impose terms upon the right of litigation, provided the same be uniform and in the shape of a public tax for the general benefit, without a violation of the letter or spirit of the seventieth section referred to. It is said by an eminent law writer of England, that so much of the twenty-ninth chapter of Magna Charta as makes King John assert that he will sell or deny justice to none, nor put off right or justice, was extorted from the monarch because it was usual to pay fines anciently for delaying law proceedings; this sometimes was extended to the defendant's life; sometimes fines were paid to expedite process and to obtain right. And in some cases the parties litigant offered part of what they were to recover to the crown. Many instances of fines are mentioned for the King's favor, and there is a particular instance of the Dean of London paying twenty marks as a fine to the King that he might assist him against the bishop in a law suit. *Observ. Mag. Chart.*, 21. The courts of law were not in those times open courts, says the same author, as they are now understood to be. An open court at present (1766) is generally so crowded with spectators that no one who hath any real business to do can have access; or if he procures access, he is not so much at his ease as those whose interests are depending have a reasonable right to insist upon. The old law required "that the plaintiff or defendant should pay nothing, but that the idle part of the audience should pay one penny each for admittance," which may be nearly equal to a shilling at present. When the servants of judges at Old Bailey, and the officers of the courts in Westminster Hall, have upon certain occasions, taken not only a penny from the spectator but even insisted on gold, are they not within the letter and the spirit of the law? asks this quaint old expounder; and it is not incumbent on the judges to put it in execution agreeable to what is enjoined. *Id.*, 102.

These little circumstances, says he, show strongly the "manners of the times," *Id.*, 102. And it is to these "manners of the times" that we are undoubtedly indebted for that great principle of Magna Charta which forbids the sale, denial or delay of justice, and not to any just and legitimate exercise of the taxing power, which is for the benefit of all, and not for the exclusive behoof of the servants of judges at old Baily, or the officers of the Court in Westminster Hall.

The object and purview of this celebrated chapter of Magna Charta is therefore best interpreted by the "manners of the times" which led the barons to demand it. Thus we are told by the historian that "the ancient Kings of England put themselves entirely on the footing of the barbarous eastern princes whom no man must approach without a present, who sell all their good offices, and who intrude themselves into every business that they may have a pretext for extorting money. Even justice was avowedly bought and sold. The King's Court itself, though the supreme judicature of the kingdom, was open to none that brought not presents to the king. The bribes given for the expedition, delay, suspension, and doubtless for the perversion of justice were entered in the public registers of the royal revenue, and remain as monuments of the perpetual iniquity and tyranny of the times. The barons of the exchequer, for instance, the first nobility of the kingdom, were not ashamed to insert, as an article in these records, that "the county of Norfolk paid a sum that they might be fairly dealt with;" the borough of Yarmouth that the king's charters, which they have for their liberties, might not be violated; Richard, son of Gilbert, for the king's helping him to recover his debt from the Jews; another that he might be permitted to make his defense in case he was accused of a certain homicide; another still for free law, if accused of wounding another; and another for having an inquest to find whether certain parties were accused of murder out of ill will or for just cause. These are a few of a great number of like instances preserved in the ancient rolls of the exchequer: 1 Hume's Hist. Eng., 504. These are the sales, delays and denials of justice—the "manners of the times"—which inflamed the barons, in the words of the historian, "to take an oath before the high altar to adhere to each other, to insist on their demands, and to make endless war on the king till he should submit to grant them:" *Id.*, 462.

We apprehend that in the three Conventions of Tennessee the idea of taxation was never for a moment considered in connection with the seventieth section of the Bill of Rights. As it was official plunder and not taxation which gave it birth in Magna Charta, so it was ordained as a part of our own organic law in the light of its own history—not to circumscribe this high attribute of sovereignty, but to elevate the standard of judicial morals, to purify the fountains of justice, and to warrant, forever, the right of the injured citizen to enter the courts and demand his rights upon such terms, applicable to all alike, as the law may prescribe for the general good.

Let the judgment be affirmed.

## NOTES.

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*RULES AND REGULATIONS adopted by the Commissioners under the Twelfth Article of the Treaty between the United States and Great Britain, concluded and signed at Washington, on the 8th day of May, A. D., 1871.*

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THE following are the articles of the Treaty relating to the Commission :

### ARTICLE XII.

The High Contracting Parties agree that all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the thirteenth of April, eighteen hundred and sixty-one, and the ninth of April, eighteen hundred and sixty-five, inclusive, not being claims growing out of the acts of the vessels referred to in Article 1 of this Treaty, and all claims, with the like exception, on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States, arising out of acts committed by subjects of Her Britannic Majesty, which may have been presented to either Commission with the other, and which yet remain other such claims which may be presented in Article XIV of this Treaty, shall be referred to the Commissioners, to be appointed in the following manner:—One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third Commissioner shall not have been appointed within three months from the date of the expiration of this Treaty, then the third Commissioner shall be named by the Representative at Washington, of His Britannic Majesty. In case of the death, absence, or incapacity of either Commissioner, or in the event of any Commissioner

omitting or ceasing to act, the vacancy shall be filled in the manner hereinbefore provided for making the original appointment; the period of three months in case of such substitution being calculated from the date of the happening of the vacancy.

The Commissioners so named shall meet at Washington at the earliest convenient period after they have been respectively named; and shall, before proceeding to any business, make and subscribe a solemn declaration, that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, all such claims as shall be laid before them on the part of the Governments of the United States and of Her Britannic Majesty, respectively; and such declaration shall be entered on the record of their proceedings.

### ARTICLE XIII.

The Commissioners shall then forthwith proceed to the investigation of the claims which shall be presented to them. They shall investigate and decide such claims in such order and such manner as they may think proper, but upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive and consider all written documents or statements which may be presented to them by or on behalf of the respective Governments in support of, or in answer to, any claim, and to hear, if required, one person on each side, on behalf of each Government, as counsel or agent for such Government, on each and every separate claim. A majority of the Commissioners shall be sufficient for an award in each case. The award shall be given upon each claim in writing, and shall be signed by the Commissioners assenting to it. It shall be competent for each Government to name one person to attend the Commissioners as its agent, to present and support claims on its behalf, and to answer claims made upon it, and to represent it generally in all matters connected with the investigation and decision thereof.

The High Contracting Parties hereby engage to consider the decision of the Commissioners as absolutely final and conclusive upon each claim decided upon by them, and to give full effect to such decisions, without any objection, evasion, or delay whatsoever.

### ARTICLE XIV.

Every claim shall be presented to the Commissioners within six months from the day of their first meeting, unless in any case where

reasons for delay shall be established to the satisfaction of the Commissioners, and then, and in any such case, the period for presenting the claim may be extended by them to any time not exceeding three months longer.

The Commissioners shall be bound to examine and decide upon every claim within two years from the day of their first meeting. It shall be competent for the Commissioners to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this Treaty.

#### ARTICLE XV.

All sums of money which may be awarded by the Commissioners on account of any claim shall be paid by the one Government to the other, as the case may be, within twelve months after the date of the final award, without interest, and without any deduction, save as specified in Article XVI of this Treaty.

#### ARTICLE XVI.

The Commissioners shall keep an accurate record and correct minutes or notes of all their proceedings, with the date thereof, and may appoint and employ a secretary, and any other necessary officer or officers, to assist them in the transaction of the business which may come before them.

Each Government shall pay its own Commissioner and agent or counsel. All other expenses shall be defrayed by the two Governments in equal moieties.

The whole expenses of the Commission, including contingent expenses, shall be defrayed by a ratable deduction on the amount of the sums awarded by the Commissioners: provided always that such deduction shall not exceed the rate of five per cent. on the sums so awarded.

#### ARTICLE XVII.

The High Contracting Parties engage to consider the result of the proceedings of this Commission as a full, perfect, and final settlement of all such claims as are mentioned in Article XII of this Treaty upon either Government; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said Commission, shall, from and after the conclusion of the proceedings of the said Commission, be

considered and treated as finally settled, barred, and thenceforth inadmissible.

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1. In addition to the representation of his claim, and the proofs in support thereof, which shall have been presented to his Government, the claimant shall file in the office of the Commission a statement of his claim, in the form of a memorial, accompanied by twenty printed copies thereof.

In cases where the amount claimed is less than one thousand dollars, the memorials will be printed at the expense of the Commission.

One copy of each memorial will, by the Secretary, be furnished to each Commissioner, and five copies to the agent of each Government.

2. Every memorial shall state the full name of the claimant, the place and time of his birth, and the place or places of his residence between the 13th day of April, 1861, and the 9th day of April, 1865, inclusive. If he be a naturalized citizen or subject of the Government by which his claim is presented, an authenticated copy of the record of his naturalization shall be appended to the memorial, and he shall state whether he has taken any and what steps towards becoming naturalized in any country other than that of his birth.

3. If the claim be preferred in behalf of a firm or association of persons other than a corporation or joint stock company, the names of each person interested, both at the date of the claim accrued and at the date of verifying the memorial, must be stated, with the proportions of each person's interest. And all the particulars above required to be given in the case of individual claimants must be stated in respect of each member of such firm or association, unless the same be dispensed with on special order of the Commission. If any transfer of the claim, or any part thereof, has occurred, the nature and mode of such transfer must be stated.

4. The memorial must state the particulars of the claim, the general grounds on which it is founded, and the amount claimed. It shall be verified by the oath or affirmation of the claimant, or, in the case hereinafter provided, of his agent or attorney; or if the claim be by a firm or an incorporate association of persons, then by the oath or affirmation of one of them; or in the case of a corporation or joint stock company, by the oath or affirmation of the president or other officer. Such oaths or affirmations may be taken, if in the United States or Great Britain, before any officer having authority, according to the laws of the place, to administer oaths or affirmations; and



they may be taken in the said countries, or elsewhere, before any consul or diplomatic agent of either Government. The verification may be by the agent or attorney only when verification by the claimant is substantially impracticable, or can only be given at great inconvenience. And in case of verification by agent or attorney, the cause of the failure of the claimant to verify it shall be stated.

Objection to the jurisdiction of the Commission, or to the sufficiency of the case stated in the memorial, may be made in the form of a demurrer, stating, without technical nicety, the substantial ground of the objection. Any new matter, constituting a special ground of defense, may be stated in a plea, which may be the subject of demurrer, and all demurrers may be set for hearing on a ten days' notice.

5. Every claimant shall be allowed two months, after the filing of his memorial, to complete his proofs; and after the completion of his proofs, and notice thereof given, two months shall be allowed for taking proofs for the defense, with such further extension of time, in each case, as the Commission on application may grant, for cause shown.

After the proofs on the part of the defense shall have been closed, the Commission will, when the claimant shall desire to take rebutting proof, accord a reasonable time for the purpose.

6. All depositions, after the filing of the memorial, shall be taken on notice, specifying the time and place of taking, to be filed in the office of the Commission, with a copy of the interrogatories, or a statement in writing by the counsel of the Government adducing the witness, showing the subject of the particular examination with sufficient precision to be accepted by the counsel of the Government against whom such witness is to be produced, to be signified by his indorsement thereon. Such interrogatories or statement to be filed in the office of the Commission at least fifteen days before the day named for the examination, with one additional day for every five hundred miles of distance from Washington to the place where the deposition is to be taken. When depositions are to be taken elsewhere than in North America, thirty days will be allowed.

7. Every deposition taken in the United States shall be taken before some officer authorized to take depositions in causes pending in courts of the United States. Depositions in Great Britain and her possessions may be taken before any person authorized to take depositions, to be used in courts of record, or any justice of the peace.

Depositions in those countries or elsewhere, may be taken before any consul or diplomatic agent of either Government.

In all cases the cross-examination of the witness may be by written interrogatories or orally, in the election of the party cross-examining.

8. The Commissioners may at any time, issue a special commission for the taking of testimony, on the application of either party; such testimony to be taken either in written interrogatories or orally, as the Commissioners may order.

The Commissioners may also, on motion of either party, order any claimant or witness to appear personally before them for examination or cross-examination.

9. When any original papers filed in the State Department of the United States or in the archives of the British Legation in Washington can not be conveniently withdrawn from the files, copies thereof will be received in evidence, when certified by the State Department or by the British Legation, as the case may be.

10. When the time has expired for taking proofs, or the case has been closed on both sides, the proofs will be printed under the direction of the Secretary, and at the expense of the Commission. The argument for the claimant shall be filed within fifteen days after the papers shall have been printed, and the case shall stand for hearing ten days thereafter.

11. The Secretary will prepare, from time to time, lists of cases ready for hearing, either upon demurrer or upon the merits, in the order in which they are entitled to be heard, or in which the counsel for the two Governments shall agree that they shall be heard.

12. All cases will be submitted on printed arguments, which shall contain a statement of the facts proven and references to the evidence by which they are proven, and, *in addition*, the counsel for the respective Governments will be heard whenever they desire to argue any cause orally. Arguments of counsel for individual claimants will be received, in print, when submitted by the counsel of either Government, and not otherwise.

13. Claims against the United States and Great Britain, respectively, will be entered in separate dockets, kept by the Secretary. The dockets shall contain an abstract of all proceedings, motions, and orders in each case.

14. The Secretary will keep a record of the proceedings of the Commission upon each day of its session, which shall be read at the

next meeting, and will then be signed by him and approved by the signature of the presiding Commissioner.

15. The Secretary will keep a notice book, in which entries may be made by the counsel for either Government, and all entries so made shall be notice to the opposing counsel.

16. The Secretary shall provide books of printed forms, in which will be recorded the awards of the Commission, signed by the Commissioners concurring therein. The awards against each Government will be kept in a separate book.

17. A copy of each award, certified by the Secretary of the Commission, will be furnished, on request, to the party upon whose claim such award shall have been made.

18. The dockets, minutes of proceedings, and records of awards, will be kept in duplicate, one of which will be delivered to each Government at the close of the duties of the Commission.

19. The Secretary will have charge of all the books and papers of the Commission, and no paper shall be withdrawn from the files or taken from the office without an order of the Commission.

## BOOK NOTICES.

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*Tennessee Reports. Reports of Cases argued and determined in the highest Courts of Law and Equity in the State of Tennessee. A new Edition, from Overton to Meigs, inclusive. With Notes and References. By WM. F. COOPER: Published by Soulè, Thomas & Winsor, St. Louis, Mo. For sale at W. T. Berry & Co.'s, Nashville, Tenn.*

THE value of our earlier decisions, owing, no doubt, to the rarity of the volumes of late years, has been greatly underrated. "There were giants in those days," both at the bar and on the bench; and the important cases were argued with great ability, and usually decided correctly. The rules of practice, and the principles of law, were, in those days, drawn with more precision, more clearly cut, than of late years. The tendency, now, is to ignore rules of practice, and to bevel off the sharp edges of the law, so that the parts dovetail into each other in such a way that it requires keen eyes to see the line of severance. It may be that the modern usage is the best, for it tends to diminish technicalities, and to secure the trial of causes upon the merits—most desirable ends—but the young lawyer would do well to sharpen his powers of discrimination by a diligent study of these early precedents. They contain, so to speak, the common law of the State. The *rationale* of many of the usages of our courts, and of many of our settled rules of decision, can only be comprehended by tracing these usages and rules to their origin. It will generally be found that they were only established after careful investigation, and frequently a sharp struggle.

There seems to be an impression that our earlier books are filled with land cases, of great moment in their day, but of little use at present. This is a mistake, as will be obvious to any one who considers how small a part of our Digests, even of Mr. Meigs' admirable Digest, who lingered over these cases with a fondness that belonged to a past generation, is thus occupied. The number of land cases bears no proportion to the number of cases in other branches of the law. Besides, many of these cases, even where they turn upon points of purely local legislation, embrace questions of practice, evidence and general principle, still of daily use. Even where the liti-

gation originated in our peculiar land laws, the rights of the parties will be found to turn upon general principles applicable to all time, and to any system. They could, no doubt, be used to advantage in the numerous land suits of the day in Texas, Kansas, California and other Western States and Territories. Systems may vary, and facts may differ; but the fundamental principles which underlie them, and upon which the rights of litigants must turn, are always the same.

The present work, as was to have been expected from the great learning and ability of its editor, has been very skillfully and systematically arranged and prepared. Instead of placing his references at the end of the cases, or in foot-notes to the body of the opinion, the editor has attached them directly to the syllabus to which they belong. Each case contains, immediately in connection with the proper subject-matter, a reference to every other in our Reports up to Coldwell, in which it has been cited. In nearly every case the reference shows the object of the citation, and whether the subsequent decision is in accord or in conflict with the case cited, or has qualified the ruling in any way. But the references have not been confined to the cases in which citations are made; the aim seems to have been to make the reprinted volumes a Concordance to our Reports, so that each case will not only be a guide to all other cases where its rulings have been cited, but to analogous cases.

This work, as it seems to us, is of almost invaluable assistance to the Bench and Bar of this State, and should be in every lawyer's library.

*Leading and Select American Cases in the Law of Bills of Exchange, Promissory Notes, and Checks:* arranged according to Subjects. With Notes and References. By ISAAC F. REDFIELD and MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1871. For sale at W. T. Berry & Co.'s, Public Square, Nashville.

In preparing the above work, the editors state that they have first endeavored to present the history of commercial paper throughout its usual stages, and then to illustrate such collateral branches of the general subject as are of practical importance. They have aimed to present the largest possible number of valuable cases, and to illustrate as wide a range of topics as space would permit. Upon subjects involved in conflict, decisions presenting the different rulings have been selected as principal cases; and to these have been added notes, citing the authorities which have followed or rejected the doctrine of the re-

specive cases, and stating the general current of adjudication upon the subject. For instance, at page 124, the case of the *President, Directors, etc., of the Union Bank of Weymouth and Braintree vs. Tilley Willis*, 8 Metcalf, 504, (Mass.) is published in full, to the effect that if a person not a party to a note place his name upon the back of it at the time it was made, he is liable as maker; and when the note is in the hands of a *bona fide* holder, the presumption, in the absence of proof, is that the name was placed upon it at the time it was executed. In the note at the end of the case, the editors state that it is followed in Massachusetts by *Hawkes vs. Phillips*, 7 Gray, 284, and by *Draper vs. Weld*, 13 Gray, 580; the latter holding evidence that the third party put his name on the note with authority to fill the blank with a guaranty, inadmissible against one who took the paper without notice. But if the payee afterwards indorse above the signature of the third party, the latter then becomes an ordinary indorser and his liability can not be changed by parol: *Clapp vs. Rice*, 13 Gray, 403. See *Howe vs. Merrill*, 5 Cush., 80; *Vore vs. Hurst*, 1 Ind., 551. If the signature of such person is written subsequently to the execution of the paper, and as an independent transaction, the signor is a guarantor: *Benthall vs. Judkins*, 13 Met., 265; *Irish vs. Cutter*, 31 Me., 536. See, also, to the same effect, *Wetherwax vs. Paine*, 2 Mich., 555; *Lewis vs. Harvey*, 18 Mo., 74; *Schneider vs. Schiffman*, 20 Mo., 571; *Childs vs. Wynn*, 44 Me., 433; *Martin vs. Boyd*, 11 N. Hamp., 385; *Carpenter vs. Oaks*, 10 Rich. Law, 17. In *McGuire vs. Bosworth*, 1 La. An., 248, it is held that such third person binds himself as surety.

We cite this case and accompanying note, to give the reader a clearer idea of the plan and nature of the work. Many of the notes are lengthy and exhaustive. The law of all the States on the subjects treated of, is clearly stated. To the practitioner, and certainly to the law student, we think this work of much greater assistance than any of the text-books on the same subject. The law student needs not merely the bare statement of a principle, but the application of it to facts.

*The Practice in Bankruptcy, with the Bankrupt Law of the United States, as amended, and the Rules and Forms; together with Notes referring to all Decisions reported to July 1, 1871; to which is added the Rules of Practice for the Courts of Equity of the United States.* By ORLANDO F. BUMP. Fourth Edition: Published by Baker,

Voorhis & Co., New York. For sale at W. T. Berry & Co.'s, Nashville.

THIS work begins with the commencement of proceedings in bankruptcy, and leads the reader, step by step, through all the successive stages to their final close. Practice, pleadings, process, remedies, and jurisdiction, are all discussed and explained, as far as it is necessary to elucidate the subject. At the close of the war, a heavy burden of debt had been placed on many, which they could never hope to pay. The debtor felt himself hampered and fettered, without any possibility of escape. The Bankrupt Act came to afford the needed relief, and the court records and reports show how eagerly its privileges were embraced. This multitude of cases has given rise to a multitude of decisions, more than eight hundred of which are collected and digested in the present work. The decisions were scattered through different law periodicals. The author states that it is believed that scarcely a single case contained in any report or periodical can be found which is not cited in this edition. Marks in the text refer the practitioner to the Notes, and to the Rules and Forms, so that he can tell at a glance whether the law has been amended or construed, and what are the views of the Supreme Court upon the point he is considering.

*English Law Reports. Common Law and Equity Series for September and October, 1861.* Published by T. & J. W. Johnson & Co., Philadelphia. For sale at W. T. Berry & Co.'s, Public Square, Nashville, Tenn.

THESE Reports—the Common Law Series edited by J. R. Bulwer, Q. C., Barrister-at-Law; the Equity Series, edited by G. W. Hemming, Barrister-at-Law—should be of much interest, and even service, to the profession, if in no other way than by enabling its members to contrast the course of adjudication in this country and England. We have given, in the present number of this Review, a Digest of the Decisions reported in Parts IX. and X., from which can be seen the character of the cases and decisions reported. These reports are reprinted in full, without omission or condensation. They are issued immediately after their publication in England. Practitioners will find them almost equal in importance to any other, save the Reports of his own particular State, as they cover very nearly every conceivable question that can arise at law.



*The Science of Legal Judgment.* A Treatise designed to show the materials whereof, and the process by which, Courts construct their judgments; and adapted to practical and general use in the discussion and determination of Law. By JAMES RAM, of the Inner Temple, Barrister-at-Law. With extensive Additions and Annotations, by JOHN TOWNSHEND, of the New York Bar. Published by Baker, Voorhis & Co., Law Publishers, 66 Nassau Street, New York. For sale at W. T. Berry & Co.'s, Public Square, Nashville.

THE first and only English edition of RAM'S TREATISE ON LEGAL JUDGMENT was published in 1834; it has long since been out of print, and copies of it have become very scarce, while the death of the author has precluded the hope of a second edition at his hands.

The book, soon after its publication in England, was reproduced in America in a very unattractive form, as part of the series of "The Law Library."

The work presents those features of painstaking and erudite research which was the peculiar characteristic of all the efforts of its distinguished author; and it has always stood very high in the estimation of the Bench and Bar. The copies in the market were quite inadequate to the demand, and a new edition has long been needed.

The present edition, besides being a literal reprint from the English copy, has incorporated some extensive additions from the English and American reports. These additions, occupying fully one-third of the volume, are indicated by being inclosed within brackets. Besides the additions to the text, the appendix and index are new.

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Bullock,	J. W. L. Daniel,	Midway.
"	Neill McPherson,	Union Springs.
Chambers,	Richards & Son,	Lafayette.
Cherokee,	J. L. Cunningham,	Gadsden.
Choctaw,	Glover & Coleman,	Butler.
Clarke,	James J. Goode,	Coffeeville.
Coffee,	G. T. Yelverton,	Elba.
Covington,	J. M. K. Little,	Andalusia.
Dale,	Benj. F. Cassady,	Ozark.
Dallas,	Pettus & Dawson,	Selma.
"	Morgan, Lapsley & Nelson,	"
De Kalb,	Nicholson & Collins,	Lebanon.
Fayette,	E. T. Jones,	Fayette C. H.
Franklin,	Wm. Cooper,	Tuscumbia.
Greene,	Crawford & Mobley,	Eutaw.
Hale,	A. A. Coleman,	Greensborough.
Henry,	Cowan & Oates,	Abbeville.
Jackson,	Robinson & Parks,	Scottsboro.

**A L A B A M A—Continued.**

<b>County.</b>	<b>Name.</b>	<b>Post Office.</b>
Lauderdale,	Wood, Kennedy & Wood,	Florence.
Lawrence,	Thomas M. Peters,	Moulton.
Lowndes,	Clements & Gilchrist,	Hayneville.
Macon,	W. C. McIver,	Tuskegee.
Madison,	Isaiah Dill,	Huntsville.
Marengo,	Geo. G. Lyon,	Demopolis.
Marshall,	Wyeth & Boyd,	Guntersville.
Mobile,	J. P. Southworth,	Mobile.
Montgomery,	Hodgson, Ferguson & Bullock,	Montgomery.
Morgan,	C. C. Nesmith,	Somerville.
Perry,	Bailey & Lockett,	Marion.
Pickens,	M. L. Stansell,	Carrolton.
Pike,	N. W. Griffin,	Troy.
Russell,	Geo. D. & Geo. W. Hooper,	Opelika.
St. Clair,	John W. Inzer,	Ashville.
Shelby,	A. A. Sterrett,	Columbiana.
Sumpter,	R. A. Meredith,	Gainesville.
Tallapoosa,	Oliver & Bulger,	Dadeville.
Talladega,	Bradford & Bradford,	Talladega.
Tuscaloosa,	Hargrove & Fitts,	Tuscaloosa.
Walker,	Wm. B. Appling,	Jasper.
Wilcox,	Howard & Howard,	Camden.

**A R K A N S A S.**

Arkansas,	Haliburton & Godden,	De Witt.
Ashley,	J. W. Van Gilder,	Hamburg.
Benton,	John A. Arrington,	Bentonville.
Bradley,	T. F. Sorrels,	Warren.
Calhoun,	M. L. Jones,	Hampton.

**ARKANSAS—Continued.**

County.	Name.	Post Office.
Carroll,	G. J. Crump,	Carrollton.
Chicot,	Street & Valentine,	Lake Village.
Clark,	H. W. McMillan,	Arkadelphia.
Columbia,	B. F. Askew,	Magnolia.
Conway,	Duncan & Woodard,	Springfield.
"	F. T. Rice,	Lewisburg.
Crawford,	Jesse Turner,	Van Buren.
Dallas,	M. M. Duffie,	Princeton.
Desha,	Same as Bradley County,	
Drew,	W. F. Slemmons,	Monticello.
Franklin,	N. W. Patterson,	Ozark.
Hempstead,	Hempstead & Eakin,	Washington.
Hot Springs,	Geo. J. Summers,	Hot Springs.
	borne,	Pineville.
	ause,	Jacksonport.
	on,	Pine Bluff.
	vens,	Clarksville.
	ton,	Lewisville.
	t,	Huntsville.
	Ewan,	Clarendon.
	a,	Mt. Ida.
	se,	Perryville.
	avis,	Helena.
	aweatt,	"
	,	Dallas.
	layliss,	Dover.
	ugh & England,	Duvall's Bluff.
	liams,	Little Rock.
	Dunn,	Forrest City.
	inley,	Benton.
	ta,	Waldron.

**ARKANSAS—Continued.**

County.	Name.	Post Office.
Sebastian,	Ben. T. Du Val,	Fort Smith.
Sevier,	J. H. Lathrop,	Locksburg.
Union,	John H. Carleton,	El Dorado.
Washington,	A. M. Wilson,	Fayetteville.
White,	B. D. Turner,	Searcy.
Woodruff,	W. A. Monroe,	Augusta.

**CALIFORNIA.**

Fresno,	C. G. Sayle,	Millerton.
Mariposa,	J. B. Campbell,	Mariposa.
Napa,	J. E. Pond,	Napa City.
Sacramento,	Robert C. Clark,	Sacramento.
San Francisco,	Provines & Johnson,	San Francisco.
“	Campbell, Fox & Campbell,	“
San Joaquin,	Joseph M. Cavis,	Stockton.
Santa Clara,	E. A. Clark,	San Jose.
Sonoma,	James A. Lamont,	Vallejo.
Stanislaus,	T. A. Caldwell,	Knight's Ferry.
Tulare.	S. C. Brown,	Visalia.

**COLORADO.**

Boulder,	G. Berkley,	Boulder.
El Paso,	E. A. Smith,	Fountain.
Fremont,	Thomas Macon,	Cannon City.
Gilpin,	Lewis C. Rockwell,	Central City.

**CONNECTICUT.**

County.	Name.	Post Office.
Fairfield,	Treat & Bullock,	Bridgeport.
Litchfield,	Hubbard & Andrews,	Litchfield.
New London,	Wait & Swan,	Norwich.

**DELAWARE.**

Kent,	Elias S. Reed,	Dover.
Newcastle,	Edward Bradford, Jr.,	Wilmington.

**DISTRICT OF COLUMBIA.**

F. P. B. Sands,	Washington. 490 Louisiana Avenue.
James H. Embry,	Washington. 1620 "I" Street.

**FLORIDA.**

Alachua,	Finley & Finley,	Gainsville.
Columbia,	R. W. Broome,	Lake City.
Duval,	Wheaton & Anno,	Jacksonville.
Escambia,	E. A. Perry,	Pensacola.
Gadsden,	Davidson & Love,	Quincy.
Hamilton,	Henry J. Stewart,	Jasper.
Jefferson,	Scott & Clarke,	Monticello.
Leon,	Edwin H. Tapscott,	Tallahassee.
Madison,	E. J. Vann,	Madison.
Putnam,	Calvin Gillis,	Pilatka.
St. Johns,	W. Howell Robinson,	St. Augustine.

**FLORIDA**—*Continued.*

County.	Name.	Post Office.
Santa Rosa,	John Chain,	Milton.
Sumter,	A. C. Clark,	Sumterville.
Suwanee,	J. F. White,	Live Oak.
Taylor,	Same as Leon County.	

**GEORGIA.**

Appling,	Same as Pierce County.	
Baker,	Smith & Jones,	Albany.
Bibb,	Nisbets & Jackson,	Macon.
Brooks,	Jno. G. McCall,	Quitman.
Burke,	John D. Ashton,	Waynesboro.
Butts,	Same as Newton County,	
Calhoun,	Same as Terrell County,	
Camden,	J. M. Arnow,	St. Mary.
Carroll,	George W. Austin,	Carrollton.
Cass,	Robert W. Murphey,	Cartersville.
Charlton,	Same as Pierce County.	
Chatham,	Harden & Levy,	Savannah.
Clarke,	S. P. Thurmond,	<small>99 Bay Street.</small> Athens.
Clay,	John C. Wells,	Fort Gaines.
Clinch,	J. L. Sweat,	Homersville.
Cobb,	W. T. Winn,	Marietta.
Coffee,	Same as Pierce County.	
Columbia,	Charles H. Shockley,	Appling.
Coweta,	Lucius H. Featherston,	Newnan.
Dade,	Robert H. Tatum,	Rising Fawn.
Decatur,	George W. Hines,	Bainbridge.
Dooley,	Same as Pulaski County.	



**GEORGIA**—*Continued.*

County.	Name.	Post Office.
Dougherty,	Same as Terrell County.	
Echols,	Same as Pierce County.	
Emanuel,	M. B. Ward,	Swainsboro.
Floyd,	Wright & Featherston,	Rome.
Forsyth,	H. L. Patterson,	Cumming.
Fulton,	Newman & Harrison,	Atlanta.
Gilmer,	H. R. Foote,'	Ellejay.
Glynn,	Harris & Williams,	Brunswick.
Gordon,	J. W. T. Johnson,	Calhoun.
Greene,	Miles W. Lewis.	Greensborough.
Gwinnett,	N. L. Hutchins,	Lawrenceville.
Hall,	Phil R. Simmons,	Gainsville.
Hancock,	J. T. Jordon,	Sparta.
Hart,	Skelton & Seidel,	Hartwell.
Henry,	Same as Newton County.	
Houston,	E. W. Crocker.	Fort Valley.
Irwin,	Same as Pulaski County.	
Jasper,	Bolling Whitfield,	Monticello.
Jefferson,	Carswell & Denny,	Louisville.
Laurens,	Rollin A. Stanley,	Dublin.
Lee,	Same as Terrell County.	
Liberty,	J. W. Farmer,	Hinesville.
Lowndes,	Whittle & Morgan,	Valdosta.
Merriweather,	John W. Park,	Greenville.
Mitchell,	W. C. McCall,	Camilla.
Monroe,	R. P. Trippe,	Forsyth.
Montgomery,	Rollin A. Stanley,	Dublin.
Morgan,	J. C. Barnett,	Madison.
Murray,	Wm. Luffman,	Spring Place.
Muscogee,	Ingram & Crawford,	Columbus.

**G E O R G I A—Cont'nued.**

County.	Name.	Post Office.
Newton,	L. B. Anderson,	Covington.
Oglethorpe,	E. C. Shackelford,	Lexington.
Paulding,	S. L. Strickland & N. N. Beall,	Dallas.
Pierce,	Jno. C. Nicholls,	Blackshear.
Pike,	H. Green,	Zebulon.
Polk,	Butt Jones,	Van Wert.
Pulaski,	Charles C. Kibbee,	Hawkinsville.
Randolph,	E. L. Douglass,	Cuthbert.
Richmond,	A. R. & H. G. Wright,	Augusta.
Schley,	Hudson & Wall,	Ellaville.
Schripen,	Geo. R. Black,	Sylvania.
Spaulding,	Same as Newton County,	
Sumter,	Hawkins & Guerry,	Americus.
Talbot,	R. H. Bullock,	Talbottom.
Taliaferro,	James F. Reid,	Crawfordsville.
Telfair,	Same as Pulaski County,	
Terrell,	R. F. Simmons,	Dawson.
Troup,	Speer & Speer,	LaGrange.
Upson,	John I. Hall,	Thomaston.
Walker,	J. C. Clements,	Lafayette.
Walton,	Jno. W. Arnold,	Monroe.
Ware,	Same as Pierce County,	
Wayne,	Same as Pierce County,	
Webster,	Thomas H. Pickett,	Preston.
Whitfield,	J. A. R. Hanks,	Dalton.
Wilcox,	Same as Pulaski County,	
Worth,	Wm. A. Harris,	Isabella.

**I D A H O .**

Nez Perce,	Jasper Rand,	Lewistown.
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**ILLINOIS.**

<b>County.</b>	<b>Name.</b>	<b>Post Office.</b>
Adams,	G. M. Fogg,	Quincy.
Alexander,	Allen, Mulkey & Wheeler,	Cairo,
Boone,	C. E. Fuller,	Belvidere.
Calhoun,	S. G. Lewis,	Hardin.
Cass,	J. Henry Shaw,	Beardstown.
Champaign,	Sweet & Lothrop,	Champaign.
Clark,	Whitehead & Hare,	Marshall.
Coles,	Wiley & Parker,	Charleston.
Cook,	E. A. Otis,	Chicago.
DeWitt,	E. H. Palmer,	Clinton.
Douglas,	R. B. Macpherson,	Tuscola.
Edgar,	T. C. W. Sale,	Paris.
Effingham,	S. F. Gilmore,	Effingham.
Fayette,	J. W. Ross,	Vandalia.
Ford,	A. M. McElroy,	Paxton.
Franklin,	Alfred C. Duff,	Benton.
Fulton,	E. T. Campbell,	Lewistown.
Gallatin,	E. N. Jones,	Shawneetown.
Greene,	Burr & Wilkinson,	Carrollton.
Grundy,	E. Sanford,	Morris.
Hancock,	David Mack,	Carthage.
Iroquois,	Blades & Kay,	Watseka.
Jefferson,	Casey & Patton,	Mt. Vernon.
Jersey,	M. B. Miner,	Jerseyville.
Kane,	Wheaton, Smith & McDole,	Aurora.
Kankalee,	C. A. Lake,	Kankalee City.
Knox,	J. B. Boggs,	Galesburg.
Lawrence,	T. P. Lowry,	Lawrenceville.
Lee,	A. K. Trusdell,	Dixon.
Livingston,	Pillsbury & Lawrence,	Pontiac.
McLean,	Stevenson & Ewing,	Bloomington.

**ILLINOIS**—*Continued.*

County.	Name.	Post Office.
Macon,	I. A. Buckingham,	Decatur.
Macoupin,	John N. McMillan,	Carlinville.
Marion,	Geo. W. Young,	Marion.
Marshall,	A. J. Bell,	Lacon.
Mason,	Wright & Cochran,	Havanna.
Massac,	Edward McMahan,	Metropolis.
Mercer,	McCoy & Clokey,	Aledo.
Montgomery,	W. T. Coale,	Hillsboro.
Morgan,	Wm. Brown,	Jacksonville.
Moultrie,	W. G. Patterson,	Sullivan.
Peoria,	Thomas Cratty,	Peoria.
Piatt,	S. R. Reed.	Monticello.
Pope,	Thomas H. Clarke,	Golconda.
Pulaski,	George S. Pidgeon,	Mound City.
Putnam,	Frank Whiting,	Granville.
Richland,	F. D. Preston,	Olney,
Rock Island,	W. H. Gest,	Rock Island.
St. Clair,	Kase & Wilderman,	Belleville.
Sangamon,	Broadwell & Springer,	Springfield.
Shelby,	Hess & Stephenson,	Shelbyville.
Stark,	Miles A. Fuller,	Toulon.
Stephenson,	Ingalls & Atkins,	Freeport.
Tazewell,	John B. Cohrs,	Pekin.
Union,	Hugh Andrews,	Jonesboro'.
Vermillion,	Wm. A. Young,	Danville.
Warren,	William Marshall,	Monmouth.
Wayne,	James A. Creighton,	Fairfield.
White,	Crebs, Conger & Hamil,	Carmi.
Woodford,	Geo. H. Kettele,	Metamora.

**INDIANA.**

<b>County.</b>	<b>Name.</b>	<b>Post Office.</b>
Allen,	Combs & Miller,	Fort Wayne.
Bartholomew,	Jno. N. Kerr,	Columbus.
Cass,	Frank Swigot,	Logansport.
Clarke,	S. L. Robison,	Charlestown.
Clay,	A. T. Rose,	Bowling Green.
Dearborn,	Adkinson & Roberts,	Lawrenceburg.
Decatur,	Gavin & Miller,	Greensburg.
DeKalb,	James E. Rose,	Butler,
Elkhart,	Blake & Johnson,	Goshen.
Fayette,	James P. Kerr,	Cornersville.
Floyd,	Huckeby & Huckleby,	New Albany.
Fountain,	Nebeker & Cambern,	Covington.
Franklin,	Chas. Moorman,	Brookville.
Gibson,	Wm. M. Land,	Princeton.
Grant,	G. T. B. Carr,	Marion.
Hamilton,	Evans & Stephenson,	Noblesville.
Hancock,	James L. Mason,	Greenfield.
Harrison,	Wolfe & Stockslager,	Corydon.
Henry,	Wm. Grose,	New Castle.
Howard,	Kroh & Bennett,	Kokomo.
Huntington,	DeLong & Mains.	Huntington.
Jackson,	Long & Long,	Brownstown.
Jasper,	Thomas J. Spitler,	Rensselaer.
Jay,	James W. Templer.	Portland.
Jefferson,	Wilson & Wilson,	Madison.
Johnson,	Jno. W. Wilson,	Franklin.
Knox,	J. S. Pritchett,	Vincennes.
LaGrange,	C. W. Wade,	LaGrange.
Lake,	Horine & Fancher,	Crown Point,
LaPorte,	E. G. McCollum,	LaPorte.
Madison,	James H. McConnel,	Anderson,

**I N D I A N A—Continued.**

County.	Name.	Post Office.
Marion,	Robert N. Lamb,	Indianapolis.
Monroe,	James B. Mulky,	Bloomington,
Morgan,	J. V. Mitchell,	Martinsville.
Ohio,	S. R. & D. T. Downey,	Rising Sun.
Perry,	Charles H. Mason,	Cannelton:
Pike,	Charles H. McCarty,	Petersburg.
Porter,	Thomas J. Merrifield,	Valparaiso.
Poesy,	Spencer & Loudon,	Mt. Vernon.
Randolph,	Browne & Thompson,	Winchester.
Scott,	W. C. Price,	Lexington.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith,	Bluffton.

**I O W A.**

Benton,	John Shane,	Vinton,
Boone,	C. W. Williams,	Boonesboro.
Cerro Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clarke,	Chaney & Reese,	Osceola.
Clinton,	Albert S. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Dusee & Henderson,	Dubuque.
Fayette,	Ainsworth & Millar,	West Union.
Greene,	Jackson & Potter,	Jefferson.
Guthrie,	Wm. Elliott,	Panora.

**I O W A**—*Continued.*

County.	Name.	Post Office.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	T. W. & John S. Woolson,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	Geo. D. Woodin,	Sigourney.
Lee,	Seaton & Allyn,	Keokuk.
Linn,	J. M. Preston & Son,	Marion.
Lucas,	E. B. Woodward,	Chariton.
Madison,	John Leonard,	Winterset.
Marion,	Atherton & Anderson,	Knoxville.
Marshall,	Parker & Rice,	Marshalltown.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Philips & Philips,	Des Moines,
Pottawatomie,	Baldwin & Wright,	Council Bluff.
Poweshiek,	L. C. Blanchard,	Montezuma.
Scott,	Stewart & Armstrong,	Davenport.
Tama,	C. B. Bradshaw,	Toledo.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Miligan,	Afton.
Wapello,	E. S. Burton,	Ottumwa.
Warren,	Bryan & Seevers,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Corydon.
Webster,	J. F. Duncombe,	Fort Dodge.
Winneshek,	John T. Clark,	Decorah.
Woodburg,	Isaac Pendleton,	Sioux City.



**K A N S A S .**

County.	Name.	Post Office.
Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Atchison,	Horton & Waggener,	Atchison.
Bourbon,	Bawden & Guerin,	Fort Scott.
Butler,	W. T. Galliher,	Eldorado.
Chase,	Wood & Ward,	Cottonwood Falls.
Coffey,	J. Cox,	Burlington.
Doniphan,	Sidney Tennen:.	Troy.
Douglas,	A. J. Reid,	Lawrence.
Franklin,	A. Franklin,	Ottawa.
Greenwood,	Fearle & Stratton,	Burlington.
Jackson,	Wm. Henry Dodge,	Holton.
Jefferson,	Morse & Stanley,	Oskaloosa.
Leavenworth,	Wm. McNeill, Clough & Lysan- der B. Wheat,	Leavenworth City
Lykins,	W. T. Johnston,	Paola.
Lyon,	W. T. McCarty,	Emporia.
Miami,	James Kingsley.	Paola.
Morris,	A. J. Hughes,	Council Grove.
Pottawatomie,	R. S. Hick,	Louisville.
Shawnee,	James M. Spencer,	Topeka.
Woodson,	Same as Coffey County, A. M. Crockett,	Neta waka

**K E N T U C K Y .**

Ballard,	G. W. Reeves,	Blandville.
Barren,	N. A. & G. R. Smith,	Glasgow.
Bath,	Nesbitt & Gudgell,	Owingsville.
Caldwell,	F. W. Darby,	Princeton.
Callaway,	R. D. Brown,	Murray.

**KENTUCKY**—*Continued.*

County.	Name.	Post Office.
Carter,	J. R. Botts,	Grayson.
Clarke,	W. M. Beckner,	Winchester.
Clay,	Same as Laurel County,	
Crittenden,	Same as Livingston County,	
Fayette,	Wm. C. P. Breckenridge,	Lexington.
Fleming,	A. E. Cole,	Flemingsburg.
Floyd,	E. G. H. Harris,	Prestonsburg.
Franklin,	T. N. & D. W. Lindsey,	Frankfort.
Fulton,	John A. Lauderdale,	Hickman.
Garrard,	Jas. A. Anderson,	Lancaster.
Grant,	W. T. Simmonds,	Williamstown.
Graves,	Mayes & Langridge,	Mayfield.
Grayson,	Thomas E. Ward,	Litchfield.
Green,	Wm. B. Allen,	Greensburg.
Greenup,	B. F. Bennet,	Greenup.
Hart,	George T. Reed,	Munfordsville.
Henry,	Buckley & Buckley,	New Castle,
Hickman,	F. M. Ray,	Clinton.
Jefferson,	Edward Badger,	Louisville.
“	Marshall & Marshall,	“
Jessamine,	H. A. Anderson,	Nicholasville.
Johnson,	J. Frew Stewart,	Paintsville.
Knox,	F. P. Stickley,	Barboursville.
Laurel,	Pearl & Stephens,	Laurel.
Lewis,	George T. Halbert,	Vanceburg.
Livingston,	Bush & Bush,	Smithland.
Logan,	A. G. Rhea,	Russellville.
Lyon,	Dan B. Cassidy,	Eddyville.
McCracken,	Houston & Houston,	Paducah.
McLean,	S. J. Boyd,	Calhoun.
Magoffin,	D. D. Sublett,	Salyersville.

**KENTUCKY—Continued.**

County.	Name.	Post Office.
Mason,	Same as Lewis County,	
Meade,	Kincheloe & Lewis,	Brandenburg.
Mercer,	Spilman & Spilman,	Harrodsburg.
Metcalf,	John W. Compton,	Edmonton.
Montgomery,	John Jay Cornelison,	Mount Sterling.
Morgan,	Same as Bath County,	
Nicholas,	Same as Bath County,	
Oldham,	J. W. Clayton,	Lagrange.
Powell,	A. C. Daniel,	Stanton.
Rowan,	Same as Bath County,	
Pulaski,	W. H. Pettus,	Somerset.
Rock Castle,	James G. Carter,	Mt. Vernon.
Russell,	J. A. Williams,	Jamestown.
Scott,	Geo. E. Prewitt,	Georgetown.
Shelby,	Erasmus Frasier,	Shelbyville.
Simpson,	G. W. Whitesides,	Franklin.
Taylor,	D. G. Mitchell,	Campbellsville.
Todd,	J. H. Lowry,	Elkton.
Trigg,	Jno. S. Spiceland,	Cadiz.
Trimble,	Jacob Yeager,	Bedford.
Union,	John S. Geiger,	Morganfield.
Warren,	Bates & Wright,	Bowling Green.
Washington,	Richard J. Browne,	Springfield.
Webster,	A. Edwards,	Dixon.
Whitley,	Same as Laurel County,	
Woodford,	Turner & Twyman,	Versailles.

## LOUISIANA.

Parish.	Name.	Post Office.
Ascension,	R. N. Sims,	Donaldsonville.
Avoyelles,	Irion & Thorpe,	Marksville.
Baton Rouge,	Geo. W. Buckner,	Baton Rouge.
Caddo,	Newton C. Blanchard,	Shreveport.
Caldwell,	Arthur H. Harris,	Columbia.
Carroll,	H. P. Wells,	Delhi.
"	Ed. F. Newman,	Floyd.
Catahoula,	Smith & Boatner,	Harrisonburg.
East Feliciana,	Frank Hardesty,	Clinton.
Franklin,	Wells & Corkern,	Winsborough.
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine.
Jackson,	James E. Hamlett,	Vernon.
Lafayette,	Conrad Debaillon,	Vermillionville.
Lafourche,	Thomas L. Winder,	Thibodeaux.
Madison,	Wells & Rainey,	Delta.
Morehouse,	Newton & Hall,	Bastrop.
Natchitoches,	Morse & Dranguet,	Natchitoches.
Orleans,	Sam. C. Reid,	New Orleans.
"	Canonge & Cazabat,	" "
Point Coupee,	Thomas H. Hewes,	Point Coupee.
Rapides,	Wm. A. Seary,	Alexandria.
Richland,	Wells & Williams,	Rayville.
St. Landry,	Joseph M. Moore,	Opelousas.
Tensas,	Reeve Lewis,	St. Joseph.
Terrebonne,	John B. Winder,	Houma.
Union,	J. E. Trimble,	Farmerville.
Vermillion,	Same as Lafayette Parish,	
Webster,	A. B. George,	Minder.
Washita,	R. W. Richardson,	Monroe.
West Feliciana,	Samuel J. Powell,	St. Francisville.
Winn,	W. R. Roberts,	Winnfield.

**MAINE.**

County.	Name.	Post Office.
Aroostook,	Madigan & Donworth,	Houlton.
Kennebec,	Joseph Baker,	Augusta.
Knox,	Geo. H. M. Barrett,	Rockport.
Oxford,	Virgin & Upton,	Norway.
Piscataquis,	E. W. McFadden,	Kendall's Mills.

**MARYLAND.**

Alleghany,	Semmes & Read,	Cumberland.
Anne Arundel,	Randal & Hagner,	Annapolis.
Baltimore,	Reverdy Johnson & C. G. Kerr,	Baltimore.
"	John Thompson Mason,	"
"	John J. Vellott,	Towsonton.
Caroline,	James B. Steele,	Denton.
Cecil,	Jno. E. Wilson,	Elkton.
Charles,	S. Cox, Jr.,	Port Tobacco.
Frederick,	Wm. P. Maulsby, Jr.,	Frederick.
Kent,	Same as Queen Anne's County,	
Prince George's,	Daniel Clarke,	Upper Marlboro'.
Queen Anne's,	John B. Brown,	Centreville.
St. Mary's,	Combs & Downs,	Leonardtwn.
Talbot,	Same as Queen Anne's County,	

**MASSACHUSETTS.**

Bristol,	Charles A. Read,	Taunton.
Plymouth,	Same as Bristol County,	
Suffolk,	Same as Bristol County,	
Talbot,	C. H. Gibson,	Easton.

**M I C H I G A N .**

County.	Name.	Post Office.
Allegan,	Arnold & Stone,	Allegan.
Barry,	Wm. H. Hayford,	Hastings.
Bay,	C. H. Denison,	Bay City.
Calhoun,	Wm. H. Brown,	Marshall.
"	Alvan Peck,	Albion.
Houghton,	Ball & Chandler,	Houghton.
Huron,	Richard Winsor,	Port Austin.
Ingham,	Wm. H. Pinckney,	Lansing.
Isabella,	I. N. Fancher,	Isabella.
Jackson,	Johnson & Montgomery,	Jackson.
Lenawee,	Geddes & Miller,	Adrian.
Macomb,	Edgar Weeks,	Mt. Clemens.
Marquette,	Maynard & Ball,	Marquette.
Oakland,	O. F. Wisner,	Pontiac.
Oceana,	F. J. Russel,	Hart.
Ottawa,	L. B. Soule,	Grand Haven.
Saginaw,	Gaylord & Hanchett,	Saginaw.
St. Clair,	Atkinson & Parsons,	Port Huron.
St. Joseph,	Mason & Melendy,	Centreville.
Shiawassee,	E. Gould,	Owasse.
Tuscola,	J. P. Hoyt,	Caro.
Wayne,	Meddaugh & Driggs,	Detroit.

**M I N N E S O T A .**

Benton,	J. Q. A. Wood,	Sauk Rapids.
Dodge,	G. B. Cooley,	Mantorville.
Fillmore,	Murray & McIntire,	Rushford.
Martin,	M. E. L. Shanks,	Fairmont.
Mower,	G. M. Cameron,	Austin.
Olmstead,	Butler & Shandrew,	Rochester.

**MINNESOTA—Continued.**

County.	Name.	Post Office.
Ramsey,	S. M. Flint,	St. Paul.
Stearns,	L. A. Evans,	St. Cloud.
Steele,	A. C. Hickman,	Owatonna.
Winona.	Simpson & Wilson,	Winona.

**MISSISSIPPI.**

Bolivar,	Geo. T. Lightfoot,	Nebletts Landing.
Calhoun,	A. T. Roane,	Pittsboro'.
Carroll,	James Somerville,	Carrollton.
Chickasaw,	Lacy & Thornton,	Okalona.
Choctaw,	John B. Hemphill,	French Camps.
Claiborne,	J. H. & J. F. Maury,	Port Gibson.
Clarke,	Evans & Stewart,	Enterprise.
Coahoma,	James T. Rucks,	Friars' Point.
Holmes,	H. S. Hooker,	Lexington.
Issaquena,	Same as Washington County,	
Itawamba,	Clayton & Clayton,	Tupelo.
Jasper,	Street & Chapman,	Paulding.
Jefferson,	B. B. Paddock,	Fayette.
Lauderdale,	Steel & Watts,	Meridian.
Lawrence,	K. R. Webb,	Brookhaven.
Leake,	Raymond Reid,	Carthage.
Lee,	Same as Itawamba County,	
Lincoln,	Chrisman & Thompson,	Brookhaven.
Lowndes,	Leigh & Evans,	Columbus.
Madison,	S. M. Wood,	Canton.
Marshall,	Strickland & Fant,	Holly Springs.
Monroe,	John B. Walton,	Aberdeen.
Noxubee,	Same as Oktibbeha County,	
Oktibbeha,	Ch. A. Sullivan,	Starkville.



**MISSISSIPPI—Continued.**

County.	Name.	Post Office.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Pontotoc,	Same as Itawamba County,	
Rankin,	Shelby & McCaskill,	Brandon.
Tallahatchee,	Bailey & Boothe,	Charleston.
Tishomingo,	L. T. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
Washington,	Trigg & Buckner,	Greenville.
Wilkinson,	L. K. Barber,	Woodville.
Winston,	Wm. S. Bolling,	Louisville.
Yazoo,	Miles & Epperson,	Yazoo City.

**MISSOURI.**

Adair,	Ellison & Ellison,	Kirksville.
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	Wm. O. Forrist,	Mexico.
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.
Bollinger,	Same as Madison County,	
Buchanan,	J. W. & Jno. D. Strong & J. C. Hedenberg,	St. Joseph.
Butler,	Snoddy & Matthews,	Poplar Bluff.
Caldwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Carroll,	B. D. Lucas,	Carrollton.
Chariton,	Chas. A. Winslow,	Brunswick.
Clay,	John T. Chandler,	Liberty.
Clinton,	Chas. A. Wright,	Plattsburg.
Cole,	E. S. King & Bro.,	Jefferson City.

**MISSOURI**—*Continued.*

County	Name.	Post Office.
Cooper,	John Cosgrove,	Boonville.
Daviess,	Richardson & Ewing,	Gallatin.
DeKalb,	Samuel C. Loring,	Maysville.
Dent,	G. S. Duckworth,	Salem.
Franklin,	John H. Pugh,	Union.
Gentry,	I. P. Caldwell,	Albany.
Greene,	J. Randolph Cox,	Springfield.
Grundy,	Daniel Metcalf,	Trenton.
Harrison,	D. G. Heaston,	Bethany.
Henry,	E. M. Vance,	Clinton.
Hickory,	Charles Kroff,	Hermitage.
Holt,	T. H. Parrish,	Oregon.
Iron,	J. P. Dillingham,	Ironton.
Jackson,	Holmes & Dean,	Kansas City.
Jasper,	Wm. Cloud,	Carthage.
Johnson,	N. H. Conklin,	Warrensburg.
Lafayette,	Ryland & Son,	Lexington.
Lawrence,	John T. Teel,	Mount Vernon.
Lewis,	F. W. Rash,	Monticello.
Lincoln,	McKee & Frasier,	Troy.
Linn,	A. W. Mullins,	Linneus.
Livingston,	C. H. Mansur,	Chillicothe.
McDonald,	A. H. Kennedy,	Pineville.
Macon,	A. J. Williams,	Macon City.
Madison,	B. B. Cahoon,	Fredericktown.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isaiah Latchem,	Oakhurst.
Moniteau,	Moore & Williams,	California.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Madrid.
Newton;	Same as Barry County,	

**MISSOURI—Continued.**

County.	Name.	Post Office.
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
Pike,	Fagg & Dyer,	Louisiana.
Putnam,	Hyde & Phillips,	Unionville.
Ralls,	E. W. Southworth,	New London.
Randolph,	Porter & Rothwell,	Huntsville.
St. Francois,	F. M. Carter,	Farmington.
St. Genevieve,	Same as Madison County,	
St. Louis,	Lewis & Daniel,	St. Louis, 517 1-2 Chestnut street.
"	A. H. Bereman,	St. Louis, Cor. 4th and Olive streets.
Saline,	Jno. W. Bryant,	Marshall.
Scott,	J. H. Moore,	Commerce.
Stoddard,	Hicks & McKeon,	Bloomfield.
Warren,	Same as Montgomery County,	

**MONTANA.**

Edgerton,	W. E. Cullen,	Helena.
Madison,	Samuel Word,	Virginia City.

**NEBRASKA.**

Burt,	Carrigan & Hopewell,	Tekamah.
Cass,	Maxwell & Chapman,	Plattsmouth.
Johnson,	Charles A. Holmes,	Tecumseh.
Nemaha,	Jarvis S. Church,	Brownville.
Otoe,	W. W. Wardell,	Nebraska.
Platte,	Leander Gerrard,	Columbus.

**NEVADA.**

County.	Name.	Post Office.
Humboldt,	Patrick H. Harris,	Unionville.

**NEW HAMPSHIRE.**

Cheshire,	E. M. Forbes,	Winchester.
Hillsboro',	G. Y. Sawyer & Sawyer Junior,	Nashua.

**NEW JERSEY.**

Cumberland,	Alex. H. Sharpe,	Millville.
Essex,	John W. Taylor,	Newark.
Hunterdon,	Alex. Wurts,	Flemington.
Mercer,	Leroy H. Anderson,	Princeton.
Middlesex,	James H. Van Cleef,	New Brunswick.
Monmouth,	Charles Haight,	Freehold.
Ocean,	F. J. Speer,	Tom's River.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Long,	Somerville.
Sussex,	Robert Hamilton,	Newton.
Warren,	J. G. Shipman,	Belvidere.

**NEW YORK.**

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicotville.
Cayuga,	C. W. Haynes,	Port Byron.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabethtown.
Franklin,	Horace A. Taylor,	Malone.

**NEW YORK—Continued.**

County.	Name.	Post Office.
Fulton,	McCartey & Marshall,	Gloversville.
Genessee,	J. G. Johnson,	Batavia.
Greene,	Rufus W. Watson,	Cattskill.
Lewis,	Edward A. Brown, Jr.,	Lowville.
Livingston,	Geo. W. Daggett.	Nunda.
Monroe,	H. & G. H. Humphrey,	Rochester.
Montgomery,	J. D. & F. F. Wendell,	Fort Plain.
New York,	Broome & Broome,	New York, 10 Wall Street.
“	Morrison, Lanterbach & Spin- garn,	New York, 200 Broadway.
Ontario,	Metcalf & Field,	Canandaigua.
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	Merritt King,	Newfield.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

**NORTH CAROLINA.**

Anson,	R. Tyler Bennett,	Wadesboro.
Bertie,	James L. Mitchel,	Windsor.
Buncombe,	A. T. & T. F. Davidson,	Ashville.
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.

**NORTH CAROLINA—Continued.**

County.	Name.	Post Office.
Carteret,	John M. Perry,	Beaufort.
Catawba,	John F. Murrill,	Hickory Tavern.
“	John B Hussy,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
Cherokee,	John Rolan,	Murphy.
Columbus,	J. W. Ellis,	Whiteville.
Cumberland,	Charles W. Broadfoot,	Fayetteville.
Currituck,	P. H. Morgan,	Indian Ridge.
Edgecomb,	W. H. Johnston,	Tarboro.
Greene,	W. J. Rasberry,	Snow Hill.
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Scotland Neck.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Henderson,	Same as Buncombe County,	
Jackson,	James R. Love,	Webster.
Lincoln,	W. P. Bynum,	Lincolnton.
McDowell,	W. H. Malone,	Marion.
Macon,	Same as Buncombe County,	
Madison,	Same as Buncombe County,	
Mecklenburg,	R. D. Osborne.	Charlotte.
New Hanover,	Abbott & Cantwell,	Wilmington.
Onslow,	Richard W. Nixon,	Jacksonville.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth City.
Perquimans,	J. M. Albertson,	Hertford.
Pitt,	T. L. Singletary,	Greenville.
Richmond,	Gilbert M. Patterson,	Laurenborg.
Rockingham,	Reid & Settle,	Wentworth.
Rowan,	Blackmer & McCorkle.	Salisbury.
Sampson,	Milton C. Richardson,	Clinton.
Transylvania,	Same as Buncombe County,	

**NORTH CAROLINA**—*Continued.*

County.	Name.	Post Office.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.
Washington,	Edmund W. Jones,	Plymouth.
Yadkin,	John A Hampton,	Hamptonville.
Yancey,	Same as Buncombe County,	

**O H I O.**

Adams,	F. D. Bayless,	West Union.
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapaconeta.
Belmont,	M. D. King,	Barnesville.
Brown,	Baird & Young,	Ripley.
Carroll,	C. W. Newell,	Carrolton.
Clinton,	J. M. Kirk,	Wilmington.
Columbiana,	Henry C. Jones,	Salem.
Crawford,	Thos. Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington C. H.
Franklin,	John G. McGuffey,	Columbus.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randell,	Cincinnati.
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Logan,	Kernan & Kernan,	Bellefontaine.



**O H I O—Continued.**

County.	Name.	Post Office.
Lucas,	Haynes & Price,	Toledo.
Mahoning,	Landon Masten,	Canfield.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Coddington,	Medina.
Meigs,	J. & J. P. Bradbury,	Pomeroy.
Miami,	W. S. Thomas,	Troy.
Montgomery,	Houk & McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnelsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville.
Pike,	J. J. Green,	Waverly.
Sandusky,	Jno. Elwell,	Fremont.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Schaefer,	Canton.
Tuscarawas,	A. L. Neely.	New Philadelphia.
Union,	Porter & Sterling,	Marysville.
Washington,	Knowles, Alban & Hamilton,	Marietta.

**O R E G O N .**

Benton,	John Burnett,	Corvallis.
Clackamas,	L. O. Sterns,	Baker City.
Douglas,	Wm. R. Willis,	Roseburg.
Marion,	Chester N. Terry,	Salem.

**P E N N S Y L V A N I A .**

Alleghany,	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.

**PENNSYLVANIA—Continued.**

County.	Name.	Post Office.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Chester,	Alfred P. Reid,	West Chester.
Clarion,	David Lawson,	Clarion.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
Dauphin,	I. M. McClure,	Harrisburg.
Elk,	George A. Rathburn,	Ridgeway.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	W. A. McDowell,	Uniontown.
Indiana,	I. N. Ranks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Mercer,	Griffith & Mason,	Mercer.
Montour,	Isaac X. Grier,	Danville.
Northampton,	M. Hale Jones,	Easton.
Northumberland,	S. B. Boyer,	Sunbury.
Perry,	Lewis Potter,	New Bloomfield.
Philadelphia,	Wm. Henry Rawle,	Philadelphia. <small>710 Walnut Street.</small>
Pike,	John Nyce,	Milford.
Potter,	D. C. Sarrabee,	Coudersport.
Schuylkill,	J. W. Ryan,	Pottsville.
Somerset,	Samuel Gaither,	Somerset.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

**SOUTH CAROLINA.**

County.	Name.	Post Office.
Abbeville,	Thomas Thompson,	Abbeville, C. H.
Anderson,	J. S. Murray,	Anderson, C. H.
Barnwell,	Jno. J. Maher,	Barnwell.
Beaufort,	Colcock & Hutson,	Pocotaligo.
Charleston,	Memminger, Pinckney & Jervey,	Charleston.
Chester,	Same as Fairfield County.	
Chesterfield,	W. L. T. Prince,	Cheraw.
Clarendon,	Haynsworth, Fraser & Barron,	Manning.
Colleton,	Williams & Fox,	Walterboro.
Darlington,	McIver & Boyd,	Darlington, C. H.
Edgefield,	Thomas P. Magrath,	Edgefield, C. H.
Fairfield,	James H. Rion,	Winnsboro.
Greenville,	Earle & Blythe,	Greenville.
Kershaw,	Kershaw & Kershaw,	Camden.
Lancaster,	W. A. Moore,	Lancaster.
Laurens,	S. & H. L. McGowan,	Laurens, C. H.
Marlborough,	Hudson, Livingston & Newton,	Bennettsville.
Oconee,	Same as Greenville County,	
Orangeburg,	W. J. De Treville,	Orangeburg.
Pickens,	Whitner Symmes,	Walhalla.
Richland,	Same as Fairfield County,	
Spartanburg,	J. M. Elford,	Spartanburg.
Sumter,	Richardson & Son,	Sumter.
Union,	Robert W. Shand,	Union.
Williamsburg,	Barron & Gilland,	Kingstree.

**TENNESSEE.**

Bedford,	H. L. & R. B. Davidson,	Shelbyville.
Benton,	W. F. Doherty,	Camden.

**T E N N E S S E E**—*Continued.*

County.	Name.	Post Office.
Bledsoe,	S. B. Northrup,	Pikeville.
Blount,	Sam. P. Rowan,	Marysville.
Cannon,	Burton & Wood,	Woodbury.
Carter,	W. C. Emmert,	Elizabethton.
Carroll,	James P. Wilson,	Huntington.
Cheatham,	L. J. Lowe,	Ashland City.
Claiborne,	Robert F. Patterson,	Tazewell.
Cocke,	McSween & Son,	Newport.
Davidson,	Reid & Brown,	Nashville.
Decatur,	G. W. Walters,	Decaturville.
De Kalb,	Nesmith & Bro.,	Smithville.
Dickson,	R. M. Baldwin,	Charlotte.
Dyer,	A. P. Hall,	Dyersburg.
Fentress,	A. M. Garrett,	Jamestown.
Franklin,	H. W. Newman,	Winchester.
Gibson,	Hall & Williamson,	Trenton.
Giles,	James & W. H. McCallum,	Pulaski.
Greene,	A. W. Howard,	Greeneville.
Grundy,	Jas. W. Bouldin,	Altamont.
Hamilton,	M. H. Cliff.	Chattanooga.
Hardin,	John A. Pitts,	Savannah.
Hardeman,	Hill & Hardin,	Bolivar.
Hawkins,	A. A. Kyle,	Rogersville.
Haywood,	H. B. Folk,	Brownsville.
Henderson,	J. W. G. Jones,	Lexington.
Henry,	J. N. Thomason,	Paris.
Hickman,	O. A. Nixon,	Centreville.
Humphries,	H. M. McAdoo,	Waverly.
Jackson,	R. A. Cox,	Gainesboro.
Johnson,	Thomas S. Smyth,	Taylorsville.
Knox,	John Baxter,	Knoxville.

**T E N N E S S E E**—*Continued.*

County.	Name.	Post Office.
Lauderdale,	Wilkinson & Wilkinson,	Ripley.
Lincoln,	Bright & Sons,	Fayetteville.
Macon,	M. N. Alexander,	Lafayette.
Madison,	J. W. G. Jones,	Jackson.
Marion,	Amos L. Griffith,	Jasper.
Marshall,	James Lewis,	Lewisburg.
Maury,	Thomas & Barnett,	Columbia.
Meigs,	V. C. Allen,	Decatur.
Montgomery,	W. A. Quarles,	Clarksville.
”	John P. Campbell,	”
Monroe,	Staley & McCrosky,	Madisonville.
McMinn,	Briant & Richmond,	Athens.
McNairy,	James F. McKinney,	Purdy.
Obion,	J. G. Smith,	Troy.
Overton,	A. F. Capps,	Livingston.
Perry,	Jas. L. Sloan,	Linden.
Polk,	John C. Williamson,	Benton.
Putnam,	H. Denton,	Cookeville.
Roane,	Samuel L. Childress,	Kingston.
Robertson,	Wm. M. Hart,	Springfield.
Rutherford,	B. L. Ridley,	Murfreesboro.
Sevier,	G. W. Pickle,	Sevierville.
Shelby,	W. A. Dunlap,	Memphis.
”	H. Townsend,	<small>Cor. Madison &amp; 2d Streets.</small> Memphis.
Smith,	E. W. Turner,	Carthage.
Sullivan,	W. D. Haynes,	Blountville.
Sumner,	T. W. Barry,	Gallatin.
Stewart,	J. M. Scarborough,	Dover.
Tipton,	Peyton J. Smith,	Covington.
Warren,	John L. Thompson,	McMinnville.
Washington,	P. P. C. Nelson,	Jonesboro.

**T E N N E S S E E**—*Continued.*

County.	Name.	Post Office.
Wayne,	R. P. & Z. M. Cypert,	Waynesboro.
Weakley,	W. P. Caldwell,	Gardner.
"	Chas. M. Ewing,	Dresden.
White,	W. M. Simpson,	Sparta.
Williamson,	Hicks & Magness,	Franklin.
Wilson,	Tarver & Gollady,	Lebanon.

**T E X A S .**

Anderson,	J. N. Garner,	Palestine.
Angelina,	H. G. Lane,	Homer.
Atascosa,	W. H. Smith,	Pleasanton.
Austin,	Ben. T. & Chas. A. Harris,	Bellville.
Bell,	McGinnis & Lowry,	Belton.
Bexar,	Thomas M. Paschal,	San Antonio.
Bosque,	Henry Fossett,	Meridian.
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbia.
Brazos,	John Henderson,	Bryan.
Burk,	James H. Jones,	Henderson.
Burleson,	A. W. McIver,	Caldwell.
Caldwell,	Nix & Storey,	Lockhart.
Calhoun,	John S. Givens,	Indianola.
Cass,	Crawford & Crawford,	Jefferson.
Collin,	Same as Croke County,	
Colorado,	Same as Austin County,	
Comanche,	Same as Bell County,	
Cooke,	Weaver & Bordeaux,	Gainesville.
Coryell,	Same as Bell County,	
Dallas,	John M. Crockett,	Dallas.
Davis,	Same as Bowie County,	

**TEXAS**—*Continued.*

County.	Name.	Post Office.
Denton,	Same as Cooke County,	
DeWitt,	Friend & Smith,	Clinton.
Ellis,	H. H. Sneed,	Waxahachie.
Erath,	Same as Bell County,	
Falls,	T. P. & B. L. Aycock,	Martin.
Fannin,	Roberts & Semple,	Bonham.
Fayette,	Moore & Ledbetter,	LaGrange.
Fort Bend,	B. J. Calder,	Richmond.
Freestone,	Theo. G. Jones,	Fairfield.
Gonzales,	Harwood & Conway,	Gonzales.
Grayson,	Woods & Cowles,	Sherman.
Guadalupe,	Washington E. Goodrich,	Seguin.
Hamilton,	Same as Bell County,	
Harris,	Crosby & Hill,	Houston,
Harrison,	J. B. Williamson,	Marshall,
Henderson,	P. T. Tannehill,	Athens,
Hill,	Wm. B. Tarver,	Hillsboro.
Hopkins,	Same as Lamar County,	
Houston,	D. A. Nunn,	Crockett.
Hunt,	Sam Davis,	Greenville.
Jack,	Same as Tarrant County,	
Jasper,	Doom & Doom,	Jasper.
Jefferson,	J. K. Robertson,	Beaumont.
Johnson,	Same as Tarrant County.	
Karnes,	L. S. Lawhon,	Helena.
Kaufman,	Manion, Huffmaster & Adams,	Kaufman.
Kerr,	R. F. Crawford,	Kerrsville.
Lamar,	S. B. Maxey,	Paris.
Lampasas,	Same as Bell County,	
Lavaca,	H. R. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
McLennan,	Flint, Chamberlin & Graham,	Waco.

**TEXAS**—*Continued.*

County.	Name.	Post Office.
Marion,	Same as Bowie County,	
Matagorda,	Same as Austin County,	
Milam,	C. R. Smith,	Cameron.
Montague,	W. H. Grigsby,	Montague.
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Corsicana.
Newton,	John T. Stark,	Newton.
Nueces.	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Palo Pinto,	Same as Tarrant County,	
Parker,	Same as Tarrant County,	
Polk,	J. M. Crosson,	Livingston.
Red River,	W. B. Wright,	Clarksville.
Refugio,	Wm. W. Dunlap,	Rockport.
Robertson,	F. A. Hill,	Calvert.
Sabine,	J. M. Watson,	Hemphill.
San Augustine,	S. B. Bewley,	San Augustine.
Smith,	R. E. House,	Tyler.
Tarrant,	Hendricks & Smith,	Fort Worth.
Titus,	Henry Dillahunty,	Mount Pleasant.
Travis,	Chandler & Carleton,	Austin.
“	Hancock & West,	“
Trinity,	S. S. Robb,	Sumpter.
Upsher,	J. L. Camp,	Gilmer.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Philips, Lackey & Stayton,	Victoria.
Washington,	Same as Austin County,	
Wharton,	Same as Austin County,	
Williamson,	Coffee & Henderson,	Georgetown.
Wise,	J. W. Booth,	Decatur.
Wood,	J. J. Jarvis,	Quitman.



**U T A H.**

County.	Name.	Post Office.
Great Salt Lake,	Fitch & Mann,	Salt Lake City.

**V E R M O N T.**

Caledonia,	Belden & May,	St. Johnsbury.
Rutland,	J. Prout,	Rutland.

**V I R G I N I A**

Accomack,	Gunter & Gillet,	Accomack C. H.
Albemarle,	Blakey & Rierson,	Charlottesville.
Alexandria,	M. Dulaney Ball,	Alexandria.
Augusta,	Meade F. White,	Staunton.
Brunswick,	Same as Mecklenburg County,	
Buckingham,	N. F. Bocock,	Buckingham.
Campbell,	Wm. & John McDaniel,	Lynchburg.
Caroline,	Washington & Chandler,	Bowling Green.
Carroll,	Same as Wythe County,	
Charlotte,	Thomas E. Watkins,	Charlotte C. H.
Culpepper,	Gibson & Alcocke,	Culpepper.
Cumberland,	W. M. Cooke,	Cumberland C. H.
Dinwiddie,	Mann & Stringfellow,	Petersburg.
Fairfax,	H. W. Thomas,	Fairfax C. H.
Fluvanna,	Wm. B. Pettit,	Palmyra.
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
Gloucester,	J. T. & J. H. Seawell,	Gloucester.
Goochland,	George P. Hughes,	Goochland C. H.
Grayson,	Same as Wythe County,	
Greene,	R. S. Thomas,	Stanardsville.
Greenville,	W. S. Goodwyn,	Hicksford.

**VIRGINIA—Continued.**

County.	Name.	Post Office.
Halifax,	Same as Pittsylvania County,	
Hanover,	W. R. Winn,	Ashland.
Henrico,	Geo. L. Christian,	Richmond.
"	Wm. J. Clopton,	"
Henry,	Same as Pittsylvania County,	
Highland,	Same as Augusta County,	
Isle of Wight,	Same as Nansemond County,	
James City,	R. H. Armistead,	Williamsburg.
King William,	B. B. Douglas,	Ayletts.
Lancaster,	B. H. Robinson,	Lancaster.
Lee,	David Miller,	Jonesville.
London,	Jno. M. Orr,	Leesburg.
Lunenburg,	Same as Mecklenburg,	
Mathews,	T. J. Christian,	Mathews C. H.
Mecklenburg,	Chambers, Goode & Baskervill.	Boydton.
Middlesex,	Robt. L. Montague,	Saluda.
Montgomery,	John J. Wade,	Christianburg.
Nansemond,	Jno. R. Kilby,	Suffolk.
Nelson,	Thos. P. Fitzpatrick,	Arrington.
New Kent,	John P. Pierce,	New Kent C. H.
Norfolk,	Hinton, Goode & Chaplain,	Norfolk.
Nottoway,	Wm. R. Bland,	Wellville.
Page,	Richard S. Parks,	Luray.
Pittsylvania,	Reed & Bouldin,	Danville.
Price Edward,	Berkeley & Berkeley,	Farnville.
Pulaski,	Lewis A. Buckingham,	Snowville.
Roanoke,	Strouse & Marshall,	Salem.
Rockbridge,	D. E. & J. H. Moore,	Lexington.
Rockingham,	Geo. G. Grattan,	Harrisonburg.
Scott,	E. F. Tiller,	Estillville.
Smyth,	Gilmore & Derrick,	Marion.

**VIRGINIA—Continued.**

County.	Name.	Post Office.
Southampton,	J. H. & J. B. Prince,	Jerusalem.
Spottsylvania,	Marye & Fitzhugh,	Fredericksburg.
Surrey,	Geo. T. Clarke,	Bacon's Castle.
Sussex.	Same as Southampton County,	
Washington,	Frank A. Humes,	Abingdon.
Wythe,	Terry & Pierce,	Wytheville.

**WASHINGTON TERRITORY.**

Jefferson,	B. F. Dennison,	Port Townsend.
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**WEST VIRGINIA.**

Berkeley,	Blackburn & Lamon,	Martinsburg.
Cabell,	B. F. Curry,	Hamlin.
Calhoun,	Same as Jackson County,	
Fayette,	Theophilus Gaines,	Fayette C. H.
Greenbrier,	Mathews & Mathews,	Lewisburg.
Hardy,	Allen & Sprigg,	Moorefield.
Harrison,	Gideon D. Camden,	Clarksburg.
Jackson,	Henry C. Flesher,	Jackson C. H.
Jefferson,	Jo. Mayse,	Charleston.
Kanawha,	McWhorter & Freer,	Charleston.
Mason,	W. H. Tomlinson,	Point Pleasant.
Mineral,	George A. Tucker,	Piedmont.
Monongalia,	Willey & Son,	Morgantown.
Morgan,	J. Rufus Smith,	Berkeley Springs.
Ohio,	W. V. Hoge,	Wheeling.
Pocahontas,	D. A. Stofer,	Huntersville.
Preston,	G. Cresap,	Kingwood.

**WEST VIRGINIA—Continued.**

County.	Name.	Post Office.
Raleigh,	Martin H. Holt,	Raleigh C. H.
Randolph,	David Goff,	Beverly.
Roane,	J. G. Schilling,	Spencer.
Upsher,	W. G. L. Totten,	Buckhannon.
Wirt,	Same as Jackson County,	

**WISCONSIN.**

Adams,	O. B. Lapham,	Friendship.
Brown,	Hastings & Greene,	Green Bay.
Clark,	Robt. J. McBride,	Neillsville.
Dane,	Wm. F. Vilas,	Madison.
Door,	D. A. Reed,	Sturgeon Bay.
Eau Claire,	Wm. Pitt Bartlett,	Eau Claire.
Grant,	Bushnell & Clark,	Lancaster.
Green,	Dunwiddie & Bartlett,	Monroe.
Green Lake,	Jno. C. Truesdell,	Princeton.
Iowa,	Geo. L. Frost,	Dodgeville.
Juneau,	R. A. Wilkinson,	Mauston.
Kenosha,	J. J. Pettit,	Kenosha.
La Fayette,	Geo. A. Marshall,	Darlington.
Marquette,	Wm. H. Peters,	Montello.
Portage,	James O. Raymond,	Plover.
Racine,	Geo. B. Judd,	Racine.
Richland,	Eastland & Eastland,	Richland Centre.
St. Croix,	J. S. Moffat,	Hudson.
Sauk,	Howard J. Huntington,	Baraboo.
Walworth,	H. F. Smith,	Elkhorn.
Washington,	Frisby & Weil,	West Bend.



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## *Law of Negotiable Bonds and Coupons.*

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§ 1. The inventive spirit of modern finance and commerce has thrown into circulation a new species of security which is daily becoming more popular and important. We allude to bonds issued by corporations, payable to the holder or to bearer, and to the coupons attached, also payable to holder or bearer.

These securities have been recognized as negotiable by the supreme tribunals of many States of the Union, including Virginia, Connecticut, Iowa, New York, New Jersey, Illinois, Massachusetts, Mississippi, Missouri, Indiana and Wisconsin. *Arents vs. Commonwealth*, 18 Grat., 773; *Society for Savings vs. City of New London*, 29 Conn., 174; *Clapp vs. County of Cedar*, 5 Clarke, 15; *Conn. Mutual Life Insurance Co. vs. Cleveland &c., R. R. Co.*, 41 Barb., 9; *Morris Canal & Banking Co. vs. Fisher*, 1 Stock., 667; *Johnson vs. County of Stark*, 24 Ill., 75; *Chapin vs. Vt. & Mass. R. R.*, 8 Gray, 575; *Craig vs. City of Vicksburg*, 31 Miss., 216; *Railway vs. Cleneay*, 13 Ind., 161; *Clark vs. Janesville*, 10 Wis., 136; *Mills vs. Jefferson*, 20 Wis., 50; *Barrett vs. County Court*, 44 Missouri, 197. And they have been established upon a firm commercial footing by a series of decisions of the Supreme Court of the United States. *Aurora City vs. West*, 7 Wallace, 82, *White vs. Vermont & Mass. R. R. Co.*, 21 Howard, 575; *Moran vs. Commissioners of Miami County*, 2 Black, 722 *Mercer County vs. Hackett*, 1 Wallace, 83; *Gelpecke vs. City of Dubu-*

*que, Id.*, 175; *Thomas vs. Lee County*, 3 Wallace, 227; *Murray vs. Lardner*, 1 Wallace, 110; *Meyer vs. Muscatine*, 1 Wallace, 382; *Supervisors vs. Schenck*, 5 Wallace, 772.

In the case of *Mercer County vs. Hacket*, 1 Wallace, 83, which went up from Pennsylvania, the obligatory part of the bonds ran: "*Know all men by these presents*, that the county of Mercer, in the Commonwealth of Pennsylvania, is indebted to the Pittsburgh & Erie Railroad Company in the full and just sum of \$1,000, which sum of money said county agrees and promises to pay twenty years after the date hereof to the said Pittsburgh & Erie Railroad Company, or bearer, with interest at the rate of six per centum per annum, payable semi-annually, &c.," and was signed under the corporate seal of the county.

The court sustained their negotiability, and said Grier, J.: "This species of bonds is a modern invention, intended to pass by manual delivery; and their value depends mainly upon this character. *Being issued by States and Corporations, they are necessarily under seal.* But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the Common Law, can not prohibit the commercial world from inventing, or using any species of security not known in the last century. Usage of trade and Commerce are acknowledged by courts as part of the Common Law, although they may have been unknown to Bracton or Blackstone; and this malleability to suit the necessities and usages of the mercantile and commercial world, is one of the most valuable characteristics of the Common Law. When a corporation covenants to pay to bearer, and gives a bond with negotiable qualities, and by this means obtains funds for the useful enterprises of the day, it can not be allowed to evade the payment by parading some obsolete judicial decision that a bond for some technical reason, can not be made payable to bearer." The single case referred to, to the contrary of this doctrine, was *Diamond vs. Lawrence*, 37 Penn. State R., 353, which the Supreme Court entirely repudiated.

Bonds of corporations payable to "A or his assign," and assigned by A in blank, are transferable, by delivery, *Brainard vs. New York & Harlem Railroad Co.*, 10 Bosw., 832; 25 N. Y. R., 496.

§ 2. For the sake of convenience, and to facilitate the collection of the interest due on the bond, the coupons are furnished and

attached to it, as evidence of successive periodical liabilities. They are the evidence of title to demand the interest; they may be separated from the bond and negotiated apart from it; and they serve the purpose of vouchers when the money is paid upon them. But the contract for the payment of interest is *in the bond*. So intimate is the relation of the coupon to the bond, that Legislative authority to a corporation to issue bonds implies authority to attach coupons to them for the interest. *Arents vs. Commonwealth*, 18 Grat., 750.

§ 3. It is obvious from the nature and purpose of coupons, that, unlike bank-notes, they are not intended for indefinite circulation. The bank-note is issued for indefinite circulation, and the longer it circulates the better for the bank; but the coupon, though it may circulate after date of payment like a bill or note, and will pass by delivery, yet this purpose was not contemplated in its issue. The general principles applicable to other species of commercial paper are therefore applicable to them. They are payable on the day fixed for payment, and not on demand.

It was argued in *Arents vs. Commonwealth*, 18 Grat., 775, where the coupons ran "Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half yearly interest on the Wheeling bond, 269, due 1 January, 1867," that they must be regarded as payable on demand on or after the day specified, and not on that day, because the bond provides that the interest shall be paid by Duncan, Sherman & Co., "on presenting" to them the proper coupons. But the Court of Appeals held otherwise, and said Joynes, J., "sometimes the form of expressions, in such bonds is, that the coupons shall be 'surrendered,' or 'delivered.' But the meaning is the same, whether the coupon is to be 'presented,' 'surrendered,' or 'delivered'". The coupon passes by delivery, and is evidence of the title of the holder to demand the interest. This evidence of title must be produced before the money it calls for can be demanded, and it must be surrendered when the money is paid. This is just what the law requires of every holder of a negotiable security and no more. But can it be said that a bill of exchange or promissory note, payable on a specified day, or so many days after date, is not payable on a day certain, because payment can not be maintained without a presentment or surrender of the note?

"I conclude, therefore, that these coupons are negotiable instruments, payable at a day certain; namely, the day mentioned in each,



as the day the interest called for by the coupon is payable, though the holder was not bound to present them for payment on that day, so as to save the liability of the city, (the principal obligor,) or of the State, (the guarantor.)”

§ 4. In *Arents vs. Commonwealth*, 18 Grat., 775, negotiable coupons were distinguished from bills of exchange, in several particulars:

1. They are not intended for acceptance.
2. They are not entitled to grace.
3. They are drawn on bankers, and against funds deposited with them, if they are drafts at all, and are therefore *checks*, rather than bills, in the strict and proper sense.
4. To regard them as bills would make them import a contract varying from that in the bond, and impose a degree of diligence on the holder not in conformity with the general understanding and usage in respect to coupons.

§ 5. It is not material in what terms the coupon is expressed, so that it answers the purposes heretofore indicated. Sometimes they contain words of promise, making them substantially *Promissory Notes* in themselves. Thus in *Thompson vs. Lee County*, 3 Wallace, 327, the form was: “Promise to pay to the bearer, at the Continental Bank, in the city of New York, forty dollars interest on bond No. —.” Sometimes they are in the form of a bill of exchange, or draft upon the Treasury of the corporation issuing them. Thus, in *Moran vs. Commissioners of Miami County*, 2 Black., 722, the form was: “The treasurer of said county will pay the legal holder hereof one hundred dollars on the 1st day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru & Indianapolis Railroad Company.” Sometimes they are in the form of a mere ticket, or token or “Interest Warrant,” as it is called. Thus, in *Woods vs. Lawrence County*, 1 Black, U. S. R., 360, the coupon is in this form: “County of Lawrence—Warrant No.—, for thirty dollars, being for six months’ interest on bond No.—, payable on the — day of — at the office of the Pennsylvania Railroad Company, in the city of Philadelphia.”

Sometimes they are in the form of a check upon a banking house, as in *Arents vs. Commonwealth*, 18 Grat., 753, where the form was: “Duncan, Sherman & Co., of New York, will pay the bearer thirty dollars, the half-yearly interest on the Wheeling bond due 1 Janu-

ary, 1867." However the forms may vary, the intent and legal effect are the same. In all of the cases the coupon is furnished as evidence of a sum due on the bond for interest at a particular time and place, and as authority to the holder to receive it. And whether the coupon be assimilated to a note, bill or check, or be a mere ticket, or warrant of amount, and place of payment, the holder may sue on it without producing the bond; but in all cases he receives a sum due and payable according to the terms of the bond.

§6. A coupon may be negotiated after it has been separated from the bond, and the holder may recover upon it without producing the bond to which it was attached, and without being interested in the bond; the coupons being regarded by the usage of trade, and being recognized by the courts, as separable and independent securities: *Arents vs. Commonwealth*, 18 Grat., 776; *Commissioners of Knox County vs. Aspinwall*, 21 Howard, 539; *Thompson vs. Lee County*, 3 Wallace, 327; *Beaver County vs. Armstrong*, 44 Penn., 63; *Clarke vs. Janesville*, 10 Wis., 136; *Maddox vs. Graham*, 2 Met., Ky., 56; *Rose vs. City of Bridgeport*, 17 Conn., 243; *Brainard vs. N. Y. & H. R. R.*, 25 N. Y. R., 496; *Railway vs. Cleneay*, 13 Ind., 161. It has been held that the guaranty of interest warrants, annexed to bonds, may be valid, though the bonds be void: *Conn. Mut. Life Insurance Co. vs. C. C. & C. R. R.*, 41 Barbour, 9.

§7. Bonds and coupons payable to holder, are considered on the same footing as if expressed payable to bearer. In *Arents vs. Commonwealth*, 18 Grat., 750, it was said by Joynes, J.: "The Act of March 29th, 1857, in terms makes the coupons 'transferable by delivery,' but does not in terms, make the bonds themselves transferable by delivery. This however is implied in the provision that 'they shall be payable to the holder,' the obvious intent being that they shall be payable to such persons as may, from time to time, be the holder. These bonds, therefore, as well as the coupons, pass from hand to hand, by delivery." It is generally understood that both the bonds and the coupons pass by delivery only: *Morris Banking and Canal Co. vs. Lewis*, 1 Beasley, 323; *Brookman vs. Metcalf*, 32 N. Y. R., 591; *Eaton & H. R. R. Co. vs. Hunt*, 20 Ind., 457; *Conn. Insurance Co. vs. C. C. & C. R. R.*, 41 Barbour, 9; *Curr vs. LeFevre*, 27 Penn. St., 413.

§8. The degree of diligence required of the holder of a coupon, is to be ascertained by reference to the relations of the parties liable for

its payment. It must be presented within a reasonable time to save the liability of guarantor; it must be presented at maturity to charge an indorser; but they are due and payable on the day fixed for payment of interest in the bonds and, like a promissory note, payable on a certain day, need not be demanded as against the maker on that day, in order to preserve his liability: *Arents vs. Commonwealth*, 18 Grat., 750.

§ 9. The coupons in *Arents vs. Commonwealth*, 18 Grat., 776, became due and payable at different times from January 1st, 1862, to January 1st, 1864, inclusive. The plaintiff purchased them *bona fide* from the Farmers Bank in November, 1864. It did not appear by what title the bank held, and the coupons had been stolen from the second auditor of Virginia soon after they became payable. They were held by the court as overdue after 1st of January, 1864, the day of payment, and that accordingly the plaintiff could not recover against the State. "No principle," said Joynes, J., "is better settled than that a party who takes a negotiable instrument by indorsement or delivery, after it has become due, gets no better title than the party had from whom he received it. These coupons were overdue when they came into the hands of the plaintiff, and the transfer to him was subject to the rules applicable to the transfer of overdue paper: *Ashurst vs. Bank of Australia*, 37 Eng. L. & Eq., 195. Like other negotiable instruments, coupons are considered overdue as soon as the day fixed for payment has passed, whether they be in the form of promissory notes, checks, or mere interest warrants: *Arents vs. Commonwealth*, 18 Grat., 782; *Bank of Louisiana vs. City of New Orleans*, 5 Am. Law Reg., N. S. 555. The principles of the law merchant are applied to the purchaser of bonds and coupons.

§ 10. In *Murray vs. Lardner*, 2 Wallace, 110, the pure mercantile character of these instruments was fully sustained. It appeared that Lardner owned Camden & Amboy Railroad coupon bonds, *payable to bearer*, which were deposited in an iron-safe in Philadelphia. On the night of 23d of February, 1859, they were stolen, and on the morning of the next day, the 24th, they were negotiated to Murray, a broker, at his office on Wall Street, New York. Lardner sued Murray in detinue for the bonds, but was cast in the suit before the Supreme Court of the United States.

Mr. Justice Swaine, who delivered the opinion, disapproved *Gill vs.*

*Cubit*, 3 Barn & Cres., 466, and quoted with approval *Goodman vs. Harvey*, 4 Ad. & El., 870, in which Lord Denman said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title;" and considering that the good faith of Murray in the transaction had not been impeached, decided in his favor. He cited also *Swift vs. Tysen*, 16 Peters, 1; *Goodman vs. Simonds*, 20 Howard, 342; and *Bank of Pittsburg vs. Neal*, 22 Howard, 96; and declared it to be the settled law of the Court, in respect to commercial paper—

1. That possession and title are one and inseparable.

2. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

The burden of proof lies on the person who assails the right claimed by the party in possession. See also, *Morris Canal and Banking Co. vs. Fisher*, 1 Stockton Ch., 667; *Mechanics Bank vs. New York & New Haven R. R. Co.*, 3 Kernan, 599; *Moran vs. Commissioners*, 2 Black., 722.

§ 11. The holder of corporation bonds payable to bearer, may maintain an action on them in his own name: *Carr vs. LeFevre*, 27 Penn., St., 413; *Society for Savings vs. City of New London*, 29 Conn., 175; *Vertue vs. East Anglean Railroad Company*, 5 Exch., 280; and so also may the holder of coupons payable to bearer: *Johnson vs. County of Sturk*, 22 Ill., 75. But where a suit is brought for the collection of interest due on corporation bonds, evidenced by coupons, the court will not allow the payee of the bond to take judgment for the interest due, until the coupons are produced: *Redfield on Railways*, 605; U. S. Circuit Court, *Williamson vs. New Albany & Salem Railroad*, 9 Am., Railway Times, No. 37.

In the United States Supreme Court, when it was objected in Com'r's of *Knox vs. Aspinwall* 21 How., 545, (1858,) that a suit

could not be maintained on coupons without producing the bonds to which they had been attached, Nelson J., said: "The answer is, that the coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bonds, and thereby dispensing with the necessity of its production at the time of the accruing of each installment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation:" 5 Reb. Practice, 238.

It was held in Maine, in *Jackson vs. Y. & C. Railroad Company*, Am. Law Reg. (N. S. vol. 1, p. 585,) that the assignee of a detached coupon, "The York & Cumberland Railroad Company will pay nine dollars on this coupon in Portland," could not maintain an action upon it as a distinct and independent security, as the language did not imply any negotiable or independent character. But the opinion of Goodenow, J., who dissented, and sustained his views in an elaborate and able argument, has received general commendation, and the whole tendency of recent decisions is to concurrence with him. In 2 Law Reg., N. S., p. 585, Judge Redfield gives it hearty approval, and considers *White vs. Vt. & Mass. Railroad Co.* as practically affirming it.

It was held in *Crosby vs. New London, &c., Railroad Company* 26 Conn., 121, that suit could not be maintained on a coupon alone, unless it contained a distinct promise to pay the amount represented. The following case was before the Court: The railroad company's bonds acknowledged indebtedness in certain amounts to certain trustees, payable to bearer, with semi-annual interest thereon, payable to bearer, at the office of the company, on delivery of certain interest warrants annexed. An interest warrant annexed was as follows: "Interest warrant for \$30, being half yearly interest on bond No. 30 of the N. L. W. & P. R. R. Co., payable on the first day of February, 1856—J. D., Treasurer." An action of debt being brought on the warrant, the Supreme Court of the State held that it could not be made a ground of action, as it was a mere acknowledgment of interest on the bond itself, and did not import a promise; and that the bond should have been declared on, as it alone contained a promise to pay the interest.

Judge Redfield, commenting on this decision in 2 Am. Law. Reg., N. S., 597, says, "We apprehend no such distinction as this is maintained in practice; but that the coupons are regarded as equally nego-

tiable with the bonds; and that they pass currently as money, the same as the bonds themselves. And the fact that they do not contain the name of any payer, or purport to be made payable to bearer, does not seem to us of any practical importance, if, in fact, among business men they have acquired the character of negotiable securities, and of this we think there can be no question." In this, as in all similar cases, the refinement of legal technicality must, and will, give way to the practical common sense obtaining in intelligent commercial centres. Lord Holt in vain opposed the negotiability of promissory notes, and protested against the "obstinacy and opinionativeness of the merchants who were endeavoring to set the law of Lombard street above the law of Westminster Hall;" (*Clerk vs. Martin*, 2 Lord Raymond, 757), and the lovers of black letter will as vainly oppose their dogmas to the great currents of business practice and popular thought.

§ 12. It has been held in a number of cases that in an action upon a coupon, the payment of which has been refused, or for the payment of which no provision is shown to have been made, interest may be recovered from the time at which it became due and payable.

In the case of *Aurora City vs. West*, 7 Wall, 105, the Supreme Court of the United States said: "Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand like other negotiable instruments, it is quite apparent on general principles that they should draw interest after it is unjustly neglected or refused": *Gelpeke vs. DuBuyue*, 1 Wall, 206; *Thomson vs. Lee County*, 3 Wall, 332; *Hollinsworth vs. City of Detroit*, 3 McLean, 472; *Mills vs. Town of Jefferson*, 20 Wis., 50; *North Pacific R. R. Co. vs. Adams*, 54 Penn., 94; *Arents vs. Commonwealth*, 18 Grat., 776. And for like reasons, exchange would be recoverable, as in other commercial paper.

In *The City of Kenosha vs. Lamson*, 9 Wallace, 478, it was held that the Statute of Limitations placed the same limit (20 years) to coupons detached from bonds, as to the bonds themselves, the coupons being only a repetition as respects each six months, or other stated term of the contract, which the bond itself makes on the subject. And though in suing on the coupons, a recital is made of the bonds in such a general way as explains their relation to the coupons, such recital is to be considered as inducement or preamble only, and not as a suit upon the bonds.



§ 13. The English Courts have not yet treated corporation bonds, or debentures, as they call them, as strictly negotiable: *Anthæneum Life Insurance Co. vs. Pooley*, 5 Jur., N. 3, 129; *Balfour vs. Earnest*, 5 Jur. N. S., 439; 2 Redfield on Railroads, 606; Am. Law Reg., N. S., vol. II., 596. But the current of authority and opinion is gradually working in that direction, and will, in time, assert their commercial character.

In 1811, the Court of King's Bench having expressed strong doubt whether a *bona fide* purchaser for value of bonds of the East India Company would be protected against a former owner, from whom they had been obtained by fraud or theft, upon the ground that being choses in action they were not assignable at law; and that the purchaser acquired no legal title: *Glyn vs. Baker*, 13 East, 510. Parliament immediately enacted that such bonds should be assignable and transferable by delivery, and that the money secured by, and the property in them, should be absolutely vested in the assignee at law, as well as in equity: 51 Geo. III., Ch. 64. Soon after it was held that an Exchequer Bill, passed by delivery, and that the property vested in a *bona fide* holder: *Wookey vs. Pole*, 4 B. and Ald., 1. See, also, *Brandao vs. Barnett*, 1 Man., and G., 908. Subsequently, the same doctrine was applied to Prussian bonds, payable to the holder: *Gergier vs. Melville*, 3 B. and C., 45; and later still, it was left to a jury to determine whether Neapolitan bonds, with coupons, passed in like manner: *Lang vs. Smith*, 7 Bing., 284.

As the financiers and capitalists of England become more deeply interested in corporation investments, which are daily increasing in number and importance, who will doubt that they will finally, either from Parliament or the Bench, obtain the declaration that "a mere technical dogma of the Courts of Common Law shall not prohibit the commercial world from inventing or using any species of security not known in the last century," already enunciated from the Supreme Bench of the United States.

J. W. D.

### Summary of the Law of Bank Checks.

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1. A check is a draft or order on a bank or banking-house, directing it to pay a certain sum of money.<sup>1</sup>

It is, in legal effect, a bill of exchange, drawn on a bank or banking-house, with some peculiarities;<sup>2</sup> and the expression that a check is *like* a bill, has been criticised on the ground that "*nullum simile est idem*," whereas "checks are bills, or, rather, bill is the genus and check is a species."<sup>3</sup> And it has been suggested that when drawn in one State and payable in another it would be subject to damages like a foreign bill.<sup>4</sup>

It would be useless to enter into such subtle refinements—let us discuss the real properties of checks, and see how far they are governed by the rules which govern bills.

2. In the late case of the *Merchants' Bank vs. State Bank*, 10 Wallace, 647, the Supreme Court thus sums up the qualities of a check, and the differences between it and a bill:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of law merchant are alike applicable to both.

"Each is for a specific sum, payable in money. In both cases there is a drawer, drawee, and payee. Without acceptance no action can be maintained by the holder upon either, against the drawer.

"The chief points of difference are that (1) a check is always drawn on a bank or banker. (2) No days of grace are allowed. (3) The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. (4) It is not due until payment is demanded, and the statute of limitations runs only from that time. (5) It is by its

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<sup>1</sup> 2 Parsons, N. & B., 57.

<sup>2</sup> *Billgerry vs. Branch*, 19 Grat., 418; Byles on Bills (Sharswood's ed.); *Matter of Brown*, 2 Story, C. C. R., 502; *Cruger vs. Armstrong*, 3 Johns. Cas., 5; *Boehm vs. Sterling*, 7 T. R., 423; *Keene vs. Beard*, 8 C. B., N. S., 372 (98 E. C. L. R.).

<sup>3</sup> *Harker vs. Anderson*, 21 Wendell, 372.

<sup>4</sup> *Id.*



face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. (6) It is not necessary that the drawer of a bill should have funds in the<sup>1</sup> hands of the drawee. A check in such case would be a fraud. Another material difference is that in the case of a check the drawer, like the maker of a note, and unlike the drawer of a bill, is the principal debtor;<sup>2</sup> and a check, strictly speaking, is always understood to be payable on demand, though that does not expressly appear upon its face.<sup>3</sup>

3. It is frequently said that a check must be payable to bearer,<sup>4</sup> but it is as well settled as any principle of commercial law, that a check may be payable to a certain person only; or to him or his order; or to order of self; or to bearer; and may be transferred by indorsement or assignment (as the case may be) in like manner and to the like effect as a bill.<sup>5</sup> Checks are sometimes drawn payable "to the order of bills payable," or to the order of a certain number, or by some such phrase to express that negotiability which only exists in connection with the word "order." But as such a check can not be indorsed by any party, it has been held to be a check payable to bearer, and transferable by delivery.<sup>6</sup>

4. A check, like a bill or note, in order to be negotiable must be payable absolutely, and, at all events, to a certain person or order, or to bearer, in money. If expressed to be payable "in bank bills," or "in currency,"<sup>7</sup> or if it lack words of negotiability,<sup>8</sup> or be deficient in any of the characteristics which impart negotiability to bills and notes, it will not be a negotiable instrument. Checks are sometimes,

<sup>1</sup> *Alexander vs. Burchfield*, 7 Man. & G., 1067; *Boehm vs. Sterling*, 7 Term. R., 430; *Serle vs. Norton*, 2 Mood. & Rob., 404; *Keene vs. Beard*, 8 C. B. N. S., 373.

<sup>2</sup> Kent Com., 104.

<sup>3</sup> *Bowen vs. Newell*, 4 Selden, 190; *Harker vs. Anderson*, 21 Wend., 372; *Brown vs. Lusk*, 4 Yerger, 210; *Matter of Brown*, 2 Story, 502; *Edwards on Bills and Notes*, 58.

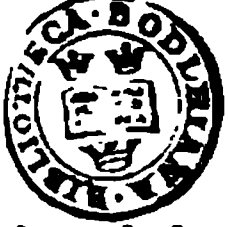
<sup>4</sup> *Byles on Bills* (Sharswood's ed.), p. 84; *Chitty on Bills*, p. 545; *Woodruff vs. Merchants' Bank*, 25 Wend., 672.

<sup>5</sup> *Billgerry vs. Branch*, 19 Grat., 418; *Matter of Brown*, 2 Story, 502; *Cruger vs. Armstrong*, 3 Johns. Cas., 5; *Elting vs. Brinkerhoff*, 2 Hall, 459; *Story on Promissory Notes*, § 488.

<sup>6</sup> *Willet vs. Phoenix Bank*, 2 Duer., 121.

<sup>7</sup> *Bank of Mobile vs. Brunn*, 42 Ala., 108; *Little vs. Phoenix Bank*, 2 Hill (N. Y.), 425.

<sup>8</sup> *Partridge vs. Bank of England*, 9 Q. B., 396.



although by no means usually, intended for temporary circulation; but their principal object and purpose is to enable the holder to demand and receive immediately the amount called for. Negotiability, in its full sense, is, therefore, not of their essence, but an optional quality.<sup>1</sup>

In Virginia checks are regulated by the statutory provisions which apply alike to bills and notes, even as respecting protest, and negotiable, if payable, (1) at a particular bank or (2) at a particular place thereof, for discount or deposit, or (3) at the place of business of a savings institution or savings bank, or (4) at the place of business of a licensed broker. Code, chap. 144, § 7, Acts 1866, p. 149.

5. While a check is regarded as an appropriation of so much of the fund on which it is drawn as will pay it, as between the drawer and payee<sup>2</sup> it can not operate as an assignment, so far as the bank and third parties are concerned until accepted,<sup>3</sup> and the verbal assent of the cashier, when absent from the bank, has been held not equivalent to acceptance;<sup>4</sup> but the circumstance that the cashier was absent from his banking-house when he certified checks as good was considered immaterial in *Merchants' Bank vs. State Bank*, 10 Wallace, 651.

But after drawing a check the drawer can not withdraw the funds;<sup>5</sup> and while the holder of the check can not sue the bank upon it without acceptance on its part, as there is nothing in the check itself to import liability on the part of the bank to pay it,<sup>6</sup> yet the bank would be liable to the holder, if by its improper refusal he lost the

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<sup>1</sup>*Mohawk Bank vs. Broderick*, 10 Wend., 304.

<sup>2</sup>*Matter of Brown*, 2 Story, 502; *Robinson vs. Hawks*, 9 Q. B., 52.

<sup>3</sup>*Mandeville vs. Welch*, 5 Wheat., 286; *Chapman vs. White*, 2 Selden, 412; *Cowperthwaite vs. Sheffield*, 3 Comstock, 243; *Dykers vs. Leather Man. Bank*, 11 Paige, 612; *Tate vs. Hilbert*, 2 Ves., Jr., 111; *Harris vs. Clark*, 2 Barbour, 94; *St. Johns vs. Hemans*, 8 Mo., 382; *Levy vs. Cavanagh*, 2 Bosw., 100; *Butterworth vs. Peck*, 5 Bosw., 341; *Lunt vs. Bank of N. America*, 49 Barb., 24; *Bellamy vs. Majoribanks*, 8 Eng. L. and Eq., 513; *Warwick vs. Rogers*, 5 Man. and G., 340; *Sims vs. Boud*, 5 B. and Ad., 389.

<sup>4</sup>*Bullard vs. Randall*, 1 Gray, 605.

<sup>5</sup>*Convoy vs. Warren*, 3 Johns. Cas., 259; *Chapman vs. White*, 2 Selden, 412.

<sup>6</sup>*Bank of Republic vs. Millard*, 10 Wallace, 152; *Wharton vs. Walker*, 4 B. & C., 163; See also, *Wharton vs. Walker*, 4 Barn. C., 163; contra *Chicago 2, N. S. Co. vs. Stanford*, 28 Ill.; *Fogarties vs. State Bank*, 12 Richardson, (Law, 518:)

See contra, *Chicago Insurance Co. vs. Stanford*, 28 Illinois, 168; *Fogarties vs. State Bank*, 12 Richardson (Law), 518.

amount or suffered damage, and likewise liable to the drawer having sufficient funds in an action of tort for the wrong done, or in assumpsit for breach of the implied contract to pay it.<sup>1</sup>

But if the funds at the bankers have been appropriated to meet a bill or note payable there, though without any further authority, it is a sufficient defense for dishonoring a check, for the law will presume that the funds were deposited to meet the bill or note there payable.<sup>2</sup>

6. In *Bank of Republic vs. Millard*, 10 Wallace, 157, the United States Supreme Court said: "*It may be*, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster, (the drawer), would be considered as holding the money to the plaintiff's use; and therefore under an implied promise to pay it on demand."

There may, also, be cases where in Equity a check might operate as an assignment to the holder; as in case of the death of the drawer and the consequent revocation of the banker's authority to pay, the holder may have relief in Equity against the banker.<sup>3</sup>

7. A check paid and held by a bank is no evidence of money loaned by it to the drawer; but on the contrary, of money previously deposited and drawn out by the drawer.<sup>4</sup> If one holds an unpaid check which has not been presented, it would not be evidence of the drawer's indebtedness,<sup>5</sup> but if presented and payment refused, it would be otherwise.

If a check payable to a party or order, and bearing his indorsement, be held in possession by the drawer after payment by the Bank, it is as good a receipt that the money has been paid as the

<sup>1</sup>*Bank of Republic vs. Millard*, 10 Wallace, 152; *Tassell vs. Cooper*, 9 C. B., 109; *Marzetti vs. Williams*, 1 B. and A., 415; *Rolin vs. Stewart*, 14 C. B., 595; 2 *Parsons*, N. and B., 61-63; *Cumming vs. Shand*, 20 L. J., Exch., 129.

<sup>2</sup>*Thatcher vs. Bank*, 5 Sandf., 121; *Keymer vs. Laurie*, 18 L. J., Q. B., 218.

<sup>3</sup>*Rodick vs. Gandelle*, 12 Beavan, 325, 1 Delg., M. and G., 763.

<sup>4</sup>*Conway vs. Case*, 22 Ill., 127; *Lancaster Bank vs. Woodward*, 18 Penn. State, 361; *Thurman vs. Van Brunt*, 19 Barb., 409; *Healy vs. Gilman*, 1 Bosw., 235; *Fletcher vs. Manning*, 12 M. & W., 571.

<sup>5</sup>*Flemming vs. McLain*, 13 Penn. State, 177; *Baker vs. Williamson*, 4 Penn. State, 177. *Aubert vs. Walsh*, 4 Taunt., 293; *Pearce vs. Davis*, 1 Mood & R., 365; *Cary vs. Gerrish*, 4 Esp., 9.

drawer could desire;<sup>1</sup> but if the check be simply payable to A. or bearer, it is not *per se* evidence of payment to A. It must be proved that he received the money, and in order to charge him as debtor, evidence of the consideration of the check must be given.<sup>2</sup> If the check be payable to the bearer, the holder's indorsement can not be required.<sup>3</sup>

The natural inference from the giving a check, is that it was given in payment of a debt due the payee from the drawer; and in order to charge the payee as a debtor to the drawer, it must be shown that the check was in fact loaned to the payee.<sup>4</sup> When the loan of money by the drawer to the payee is proved, the check may be given in evidence of the amount.<sup>5</sup>

A check is *prima facie* evidence of a valid consideration; and the possession of a check, as of other negotiable paper, is *prima facie* evidence of *bona fide* ownership for value without notice; but if it appears that the real owner parted with it without consideration, or through fraud, or that the consideration was illegal, the holder must then show that he came properly into possession through the usual course of business.<sup>6</sup>

8. There is an important distinction between the rules applying to checks, and those applying to bills of exchange. The drawer of a bill is liable for the payment thereof only when it has been duly presented for payment and dishonored by the acceptor, and he has received notice of such dishonor. But the drawer of a check, being regarded as the principal debtor, he is not discharged by laches of the holder in not making due presentment, or giving him notice of dishonor, unless he has suffered some loss or injury thereby; and then only to the extent of such loss or injury.<sup>7</sup> "He is at most,"

<sup>1</sup>Connelly vs. McKean, 64 Penn. State, 113; Burton vs. Payne, 2 Car. & P., 520; Egg vs. Barnett, 3 Esp., 186.

<sup>2</sup>The People vs. Baker, 20 Wend.; People vs. Newell, 4 Johns., 296; Cromwell vs. Lovett, 6 Wend., 369; Patton vs. Ash, 7 Sergt. & Rawle, 116.

<sup>3</sup>Connelly vs. McKean, 64 Penn. State, 113.

<sup>4</sup>Patton vs. Ash, 7 S. & R., 116; Graham vs. Cox, 2 Car. & K., 702.

<sup>5</sup>Healy vs. Gilman, 1 Bosw., 235.

<sup>6</sup>Fuller vs. Hutchings, 10 C. A. L., 523; Merchants' Exchange National Bank vs. N. B. Sav. Inst., 33 N. J. Law Repots, (4th Vroom, 170;) Fish vs. Jacobson, 1 Keys, 539, 5 Bosw., 514.

<sup>7</sup>Taylor vs. Sip, 1 Vroom, 284; Murray vs. Judah, 6 Cowen, 490; Convoy vs. Warren, 3 Johns. Cas., 259; Mohawk Bank vs. Broaderick, 10 Wend., 309; Little vs. Phoenix Bank, 2 Hill., 425; Park vs. Thomas, 13 Smedes & M., 11; Daniels vs. Kyle, 1 Kelly, 304.

as said in a recent case, "entitled to such notice as would have saved him from loss."<sup>1</sup>

9. A failure of the bank or banker on which the check is drawn, in consequence of which the drawer through delay of the holder in presenting it or giving notice of dishonor, presents the usual if not the only case in which the drawer is injured by the negligence of the holder.<sup>2</sup> It becomes important then to consider in what time the check must be presented, in order to throw the loss resulting from the failure of the bank, after it was drawn, upon the holder. As a general rule, the party receiving a check has till the following day, including banking hours, within which to present it, if he reside in the same place where the bank or banker, on whom it is drawn, is located;<sup>3</sup> and if he receive it on Saturday evening, in such case, he has until Monday morning.<sup>4</sup>

And where the check is received at a place distant from the place of payment, the party receiving it must forward it by post for presentment, to some person at such place on the next day; and the person to whom it is forwarded is not bound to present it until the day after it has reached him by due course of mail.<sup>5</sup>

If a check presented long after date is refused payment because the drawer has withdrawn his funds or closed his account, he is nevertheless liable.<sup>6</sup>

Checks issued and payable in New York City, must be presented during the same or the next succeeding day during banking hours. A longer delay, unless under circumstances excusing it, will discharge the drawer in case of a loss by insolvency of the bank occurring after the drawing and before presentment of the check.

<sup>1</sup>Matter of Brown, 2 Story, 502; Searle vs. Norton, 2 Mood. & R., 401.

<sup>2</sup>Serle vs. Norton, 2 Mood. & Rob., 401; Laws vs. Rand, 3 C. B., N. S., 442, (91 E. C. L. R.) Harbeck vs. Craft, 4 Duer, 122; Edwards on Bills, 398; *Ex parte* Brown, 2 Story, 502.

<sup>3</sup>Rickford vs. Ridge, 2 Camp., 537; Boddington vs. Schlencker, 4 Barn. & Ad., 752; Robson vs. Bennett, 2 Taunt., 410; Bailey vs. Bodenham, 16 C. B., N. S., 288, (111 E. C. L. R.); Hooker vs. Franklin, 2 Bosw., 500; Ritchie vs. Bradshaw, (5 Cal., 228); Veazie Bank vs. Winn., 40 Maine, 60; Shrieve vs. Duckham, 1 Littell, 192; Merchants' Bank vs. Spicer, 6 Wend., 443.

<sup>4</sup>O'Brien vs. Smith, 1 Black (S. C.), 99.

<sup>5</sup>Smith vs. Jones, 20 Wend., 192; Merle vs. Brown, 4 Bing. N. C., 266; Hare vs. Henty, 30 L. J., C. P., 302; Bond vs. Warden, 1 Collyer, 583.

<sup>6</sup>Convoy vs. Warren, 3 Johns. Cas., 259; Elting vs. Brinker, Hoff., 2 Hall, 459; Murray vs. Judah, 6 Cowen, 184; Robinson vs. Hawksford, 9 Q. B., 52.

The drawer's promise to pay the check when it had not been duly presented, will not bind him as a waiver unless he had knowledge of the facts as to non-presentment, which would discharge him: *Hazleton vs. Coburn*, 2 Ab., 6, N. S., 199; S. C., 1 Rol., 345.

Where a check dated 24th May, was drawn on a bank in New York—the holder living seventy-three miles distant—was presented on the 28th of May, it was held sufficient, it appearing that no more time had been spent than was required for a letter to pass from his residence to the place of payment.<sup>1</sup>

§ 10. The same rules which regulate diligence between the drawer and payee of a check, apply with equal force and effect to an indorser and indorsee, or transferer and transferee;<sup>2</sup> and although the rule stated in the preceding section, will allow a party receiving a check payable on demand, until the next day to present or forward it for payment, it only applies to the parties to the transfer, and will not be extended so as to enable a succession of persons to keep the instrument long in circulation, so as to retain the liability of the parties in case it should be ultimately dishonored. Though each party may be allowed a day, as between him and his transferer, it would be otherwise as to the drawer, if the bank should fail during a succession of several days, and would have paid if the check had been presented on the day after it was drawn. Every holder is liable to every subsequent holder, only upon due presentment and dishonor of the check, within the time for which he would be liable if the check had been presented by the party immediately claiming from or under him.<sup>3</sup>

The fact that the check is presumed to be drawn against funds makes it even more important than in the case of a bill, in order to secure against the contingency of the bank's failure, that it should be presented, and the drawer notified of its non-payment.<sup>4</sup>

§ 11. The delay in presentment will be excused by any circum-

<sup>1</sup>*Middletown Bank vs. Morris*, 28 Barb., 616.

<sup>2</sup>*Chitty on Bills*, p. 421; *Story on Notes*, § 496; *Byles on Bills* (Sharswood's Ed.), 95.

<sup>3</sup>*St. John vs. Hemans*, 8 Misso., 382; *Foster vs. Panek*, 41 Maine, 425; *Reid vs. Reid*, 11 Texas, 585; *Lilley vs. Miller*, 2 Nott & Mc., 257; *Brown vs. Lusk*, 4 Yerger, 210; *Taylor vs. Young*, 3 Watts, 343; *Hacker vs. Anderson*, 21 Wend., 372; *Cruger vs. Armstrong*, 3 Johns. Cas., 5.

<sup>4</sup>*Eichelberger vs. Finley*, 7 Harr. & John., 381; *Merchants' Bank vs. State Bank*, 10 Wallace, 657; *True vs. Thomas*, 16 Maine, 36; *Hoyt vs. Seeley*, 18 Conn., 353; *Matter of Brown*, 2 Story, 502; *Moody vs. Mark*, 43 Misso., 210; *Linvill vs. Welch*, 29 Misso., 203; *Franklin vs. Vanderpool*, 1 Hall, 78; *Foster vs. Paulk*, 41 Maine, 425; *Humphries vs. Bicknell*, 2 Littel, 296; *Pack vs. Thomas*, 13 Smedes & M., 11; *Case vs. Morris*, 31 Penn. St., 100.

stance which would excuse non-presentment. Thus, if the drawer had no funds at the time of drawing the check, or himself withdrew them,<sup>1</sup> he commits a fraud upon the payee, and suffers no loss or damage from his delay, or failure as to presentment; and when the drawer stops payment of the check, the holder may recover without notice of non-payment;<sup>2</sup> and when the bank or banker on whom it is drawn has been restrained from paying out money by order of court, or transacting business, presentment is excused.<sup>3</sup>

In *Smith vs. Jones*, 2 Bush., (Ky.), 103, the check was dated April 12th, 1862, and was not presented until 13th of January, 1863, at the Citizens' Bank of Louisiana, at New Orleans, on which it was drawn. The city had, in the meantime, been captured by the Federal forces, and the funds on which the check was drawn had become worthless. *Robertson, J.*, said: "Unlike a bill of exchange, a check does not require "due diligence," and apparent laches in presenting it for payment does not exonerate the drawer, unless by unreasonable delay he has suffered loss, and then he is entitled to relief *pro tanto*. But the evidence authorizes the deduction, that for nearly a month after the date of the appellee's check, the appellants, if only reasonably provident and diligent, might have presented the check and recovered the amount of it. And it is evident that when nine months after its date, the check was presented for payment, the property of the appellants was almost worthless, and could not be drawn from the bank, or exchanged or circulated within the Federal lines, consistently with national policy or law." It was held, therefore, that there could be no recovery on the check.

§ 12. When a check has not been presented within the time required the only effect of the delay is to throw upon the holder the *burden of proving* that the drawer has sustained and can sustain no injury or loss from the failure to demand payment at an earlier day, of the bank or banker on whom the check is drawn.<sup>4</sup> If the bank or

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<sup>1</sup>*Franklin vs. Vanderpool*, 1 Hall, 78; *Eichelberger vs. Finley*, 7 Harr. & John., 381; *Murray vs. Judah*, 6 Cowen, 484; *Convoy vs. Warren*, 3 Johns. Cas., 259; *Matter of Brown*, 2 Story, 502; *Commercial Bank vs. Hughes*, 17 Wendell, 94; *Lilley vs. Miller*, 2 Nott & Mc., 257; *Blankenship vs. Rogers*, 10 Ind., 333; *Valk vs. Simons*, 4 Mason, 113.

<sup>2</sup>*Jack vs. Darrin*, 3 Ed. Smith, 557; *Purchase vs. Mattisin*, 6 Duer, 537; *Whaley vs. Houston*, 12 La. Ann., 585.

<sup>3</sup>*Lovett vs. Cornwall*, 6 Wendell, 367.

<sup>4</sup>*Little vs. Phoenix Bank*, 2 Hill, 425; *Daniel v. Kyle*, 1 Kelly, 304; *Harbeck vs. Craft*, 4 Duer, 122.



banker is still solvent and able to pay, the drawer will be still bound to pay the check, notwithstanding that many months elapsed between its date and the presentment and notice of dishonor.<sup>1</sup> These principles seem well established, although it has been said in some cases that presentment and notice are indispensable.<sup>2</sup>

§ 13. The English and American authorities agree that there may be an acceptance of a check, although it is not very usual. The practice is growing, and has become quite common in this country, to present checks to the cashiers of the banks upon which they are drawn to be marked or certified as good, which is usually done by the cashier writing on the face of it, "Good," and it then circulates as cash,<sup>3</sup> and creates an immediate and positive engagement on the part of the bank to pay the amount called for.<sup>4</sup> The check holder becomes by such certificate substituted as a depositor in the place of the drawer; and no delay in presenting the check for payment (it being payable on demand) can prejudice his right to demand the amount when he does present it; and if in the meantime it has been paid to the original depositor, the bank is still liable to him.<sup>5</sup>

If a bank promise to honor the checks of a certain party, which promise is communicated by the drawer, and by a bank director to a third person, who receives the checks upon the faith of such promise, the bank will be bound to pay them;<sup>6</sup> but unless the holder received them on the faith of the bank's promise, it would not be.<sup>7</sup> The statement by the cashier of a bank, that a check drawn on it was good, has been held to amount to an acceptance of it.<sup>8</sup>

§ 14. In the late case of the *Merchants' Bank vs. State Bank*, 10

<sup>1</sup>Byles on Bills, (Sharswood's ed.,) 93

<sup>2</sup>English vs. Trustees, 6 Ind., 437; Cathell vs. Goodwin, 1 Harris & G., 488; Cruger vs. Armstrong, 3 Johns. Cas., 5.

<sup>3</sup>Kilsby vs. Williams, 5 Barn. & Ald., 816; Boyd vs. Emerson, 2 Ad. & El., 184; Robson vs. Bennett, 2 Taunt., 395; Merchants' Bank vs. State Bank, 10 Wallace, 647.

<sup>4</sup>Merchants' Bank vs. State Bank, 10 Wallace, 647; Meads vs. Merchants' Bank, 25 N. Y., 143; Claflin vs. Farmers' Bank, 36 Barbour, 540; Willets vs. Phoenix Bank, 2 Duer, 121; Girard Bank vs. Bank of Penn. Township, 3 Wright, 92 (39 Penn.); Barnet vs. Smith, 10 Foster, 256.

<sup>5</sup>Girard Bank vs. Bank of Penn. Township, 3 Wright, (39 Penn.,) 92; Farmers' Bank vs. Butchers' Bank, 16 N. Y., 125; Willets vs. Phoenix Bank, 2 Duer, 121.

<sup>6</sup>Nelson vs. First National Bank, 47 Ill., 36.

<sup>7</sup>Bank vs. Pettit, 41 Ill., 492.

<sup>8</sup>Barnet vs. Smith, 10 Foster, 256; see also, Irving Bank vs. Wetherland, 36 N. Y., (9 Tiffany), 335.



Wallace, 648, the subject of the certification of checks came before the Supreme Court, and the doctrine stated was confirmed, Justice Swayne saying: "By the law merchant of this country, the certificate of a bank that a check is good, is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee; that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available, also, to him for all the purposes of money." \* \* \* \*

The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting and passing from hand to hand, large sums of money.

It is computed by a competent authority that the average daily amount of such checks in use in the city of New York is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their validity.

§ 15. It has been contended that while a bank may have the power to certify checks as good, that power can not be exercised by the cashier or teller unless specially delegated to them, for the reason that it is a power to pledge the credit of the bank to its customers, which can only be exercised by the President and Directors by the constitution of a bank; and that even if a usage were proved of the certifying by the teller, it would be a bad usage, and could not be upheld.<sup>1</sup> But the case of *Merchants' Bank vs. State Bank*, 10 Wallace, 649, just cited, has decided that a bank is liable upon checks certified by its cashier, although it was proved that he had not been authorized to certify them, and although it was not shown

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<sup>1</sup>Mussey vs. Eagle Bank, 9 Metcalf, 313.

that he had ever certified checks before, or that the cashiers of banks in the same place were accustomed to certify checks as good. The Court said: "The power of the bank to certify checks has been sufficiently considered. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. When the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii*. The power is inherent in the office.<sup>1</sup>

The cashier is the executive officer through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed; but they are under his direction, and are, as it were, the arms by which designated portions of his work are discharged. A teller may be clothed with the power to certify checks, but this in itself, would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper; but this would not affect those to whom the limitation was unknown.<sup>2</sup>

In *Barnes vs. Ontario Bank*, 19 N. Y., 156, the cashier had issued a false certificate of deposit. In *The Farmers Bank vs. Butchers Bank*, 14 N. Y., 624, and 16 N. Y., 133, and in *Mead vs. Merchants' Bank*, 25 N. Y., 146, the Teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

§ 16. The certification of a promissory note, payable at a bank, as "good," when there is a custom to do so, is as binding as the certification of a check; and the bank must pay it at maturity. In *Mead vs. Merchants' Bank*, 25 N. Y., (11 Smith,) 148, the Court said:

<sup>1</sup>*Will v. The Bank of Passamaquoddy*, 3 Mason, 506; *Burnham v. Webster*, 19 Maine, 234; *Elliott v. Abbott*, 12 N. H., 556; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Lloyd v. The West Branch Bank*, 15 Penn. State, 172; *Badger v. Bank of Cumberland*, 26 Maine, 428; *Bank of Kentucky v. Schuylkill Bank*, 1 Parson's Select Cases, 182; *Fleckner v. Bank of U. S.*, 8 Wheat, 360.

<sup>2</sup>*Commercial Bank v. Norton*, 1 Hill, 501; *Beers v. Phoenix Glass Co.*, 14 Barbour, 358; *North River Bank v. Aymar*, 3 Hill, 262.

"The presentation of the note at the counter of the bank, on its maturity, for payment, was in the ordinary course of business; and so was the certificate then and there indorsed by the Teller, certifying that the same was good. The legal effect and force of such certificate was, that the maker had deposited funds in the bank to meet said note; and that the bank then held the same in deposit for that purpose, and would pay the amount upon request. \* \* \*

The indorsement was, in effect, an absolute engagement on the part of the bank to pay the note, and dispense with protest, or steps to charge the indorser, as much so as if the defendant had actually received the cash on the presentation of the note, instead of taking the certificate of the Teller that the note was good."

Where the President of a bank, having authority to certify checks, certified checks drawn by himself, and checks drawn by another person, and delivered them to the payee, who transferred them to a *bona fide* holder, the latter may enforce payment by the bank, notwithstanding the drawers had no funds; for while an agent can not in general, act so as to bind his principal in matters touching his agency, where he has an adverse interest in himself, there is an exception to the general rule in favor of the holder of negotiable paper acquired in good faith before due, for value, without notice of the agent's misconduct, or of such facts as amount to want of good faith in the taker of such paper.<sup>1</sup>

§ 17. When a check is presented for payment, and the bank detains it an unreasonable time, without refusal to honor it, it would be regarded as acknowledging its indebtedness; but a bank, like the drawee of a bill, is entitled to twenty-four hours to determine whether or not to certify or pay it, and may return it at any hour within that time.<sup>2</sup>

§ 18. If a bank has, by mistake, or through fraudulent representation, certified a check to be good, or so stated to a third party, it may, nevertheless, recall its certificate, or retract its acceptance, provided it can do so in time to prevent any loss to the payee;<sup>3</sup> but if the check has been paid to a *bona fide* holder, without notice, previous to the discovery of the mistake or fraud,<sup>4</sup> or has passed into the

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<sup>1</sup>Claffin vs. Farmers' and Citizens' Bank, 36 Barb., 540, overruling S. C., 25 N. Y., (11 Smith,) 293; 24 How., 1.

<sup>2</sup>Overman vs. Hoboken City Bank, 31 N. J. L. R., (2 Vroom,) 563.

<sup>3</sup>Irving Bank vs. Wetherald, 36 N. Y., (9 Tiffany,) 335; 31 Barbour, 323.

<sup>4</sup>Bank of the Republic vs. Baxter, 31 Vt., 101.

hands of such a holder, it will be too late for the bank to reclaim it.

§ 19. The holder of a check is not bound to receive part payment thereof; and the bank is not bound to pay it, unless in full funds, for the reason that it is entitled to possession of the check as a voucher for payment.<sup>1</sup> The mere priority in drawing a check creates no right of priority over holders of subsequent checks; and where several checks are presented at the same time, the bank is not bound to pay one rather than another, when the funds in hand are not sufficient to pay all.<sup>2</sup> But if the bank choose to pay the first in date, there could be no reasonable ground of complaint.<sup>3</sup>

§ 20. One who knowingly takes a dishonored check, takes it subject to the drawers' equities against the transferrer;<sup>4</sup> but a check is not considered as overdue until payment has been demanded, as it is payable on demand;<sup>5</sup> and unless such time has elapsed since its date as to put the receiver on his guard, or there is some mark on the check, or circumstance about it to indicate its dishonor, the holder will not be regarded as having notice that it has been dishonored.<sup>6</sup> One who takes a check having a time specified for its payment, and long overdue, takes it subject to its equities.<sup>7</sup> The lapse of two and a half years—especially when the check contains a mark indicating that it was a memorandum check—has been held to open a check to equities.<sup>8</sup>

In *Ames vs. Meriam*, 98 Mass., 294, where the holder had taken the check ten days after date, it was said: "A holder who takes a check in good faith and for value, several days after it is drawn, receives it without being subject to defenses of which he has no notice before or at the time his title accrues."

If a check has been torn to pieces and pasted together, or has any other indication upon it that it has been cancelled, the bank should

<sup>1</sup>Matter of Brown, 2 Story, 502; *St. John vs. Homans*, 8 Misso., 382.

<sup>2</sup>*Dykens vs. Leather Manf'g Co.*, 11 Paige, 611. <sup>3</sup>1 Parsons, N. & B., 78.

<sup>4</sup>*Rounsavel vs. Schoelfield*, 2 Cr. C. C., 139; *Boehm vs. Sterlling*, 7 T. R., 423; *Lancaster Bank vs. Woodward*, 18 Penn. State R., 357; *Fuller vs. Hutchings*, 10 Cali., 523.

<sup>5</sup>*Brooks vs. Mitchell*, 9 M. & W., 15; *Dunn vs. Halling*, 4 B. & C., 330; *Bank of Bengal vs. Fagan*, 7 Moore P. C., 72; *Serrel vs. Derbyshire, R. R.*, 9 C. B., 811; *Anderson vs. Busteed*, 5 Duer., 485; *Cruger vs. Armstrong*, 3 Johns. Cas., 5; *Murray vs. Judah*, 6 Cowen., 490.

<sup>6</sup>*Rotschild vs. Correy*, 1 Dan. & L., 325.

<sup>7</sup>*Lancaster Bank vs. Woodward*, 18 Penn. St. R., 357.

<sup>8</sup>*Skillman vs. Titus*, 32 N. J. Law R., (3 Vroom.,) 96.

refuse payment; and if it pays it does so at the peril of being required by the drawer to pay him.<sup>1</sup> But if by the drawer's fault, the bank pays an altered, forged, or otherwise invalid check, the bank will not be liable to him.<sup>2</sup>

§ 21. Unless some sufficient excuse exists for non-presentment, a demand and refusal before suit brought, and either notice to the drawer, or a waiver of it, is necessary in order to hold him bound;<sup>3</sup> but if the drawer drew the check without funds to meet it, he may be sued at once without presentment, demand, or notice.<sup>4</sup>

§ 22. As said in a previous section, checks are payable on demand without the days of grace allowed other commercial paper; and it has been held that when payable upon a future day, a check is not entitled to grace, on the ground that it is presumed to be drawn upon funds deposited in the bank, and grace is not required as in the case of bills to meet it.<sup>5</sup> But the mere fact that the bank is the drawer, does not necessarily make the instrument a check, and the better opinion seems to be that a draft upon a bank payable at a future day is entitled to grace, and is subject to the like incidental limitations as a bill of exchange.<sup>6</sup> Professor Parsons, whose language we adopt, says: "If it be correctly dated on the day on which it is drawn, but expressly made payable at a future day, we know no sufficient reason why it should not have grace." 2 N. & B., 68-9.

<sup>1</sup>Scholey vs. Ramsbottem, 2 Camp., 485.

<sup>2</sup>Lickbarrow vs. Mason, 2 T. R., 63.

<sup>3</sup>Sherman vs. Comstock, 2 McLean, 19; Case vs. Morris, 7 Casey, 109; Harker vs. Anderson, 21 Wend., 372; Murray vs. Judah, 6 Cowen, 484; Jaudan vs. Read, 32 Howard, 190.

<sup>4</sup>Cromwell vs. Lovett, 6 Wend., 369; True vs. Thomas, 16 Maine, 36.

<sup>5</sup>In the matter of Brown, 2 Story, 502, it is said: "If a check be dated on the first day of December, and be payable on the 10th of December, it is presentable on the latter day, and on presentment on that day will be paid by the bank. It is never presented for acceptance, and no days of grace are allowed upon it. In short, it is always treated as payable on the very day designated for payment." See also, Veazie Bank vs. Winn, 40 Maine, 60; Taylor vs. Wilson, 11 Met., 44; Salter vs. Burt, 20 Wend., 205; Bowen vs. Newell, 4 Selden, 190; Mohawk Bank vs. Broaderick, 10 Wend., 304; Westminster Bank vs. Wheaton, 4 Rhode Island, 30; Woodroof vs. Merchants Bank, 25 Wend., 673.

<sup>6</sup>Henderson vs. Pope, 39 Geo., 361; Ivory vs. Bank of Missouri, 36 Misso., 475; 5 Am. Law. Reg., N. S., 552; Brown vs. Lusk, 4 Yerger, 210; Taylor vs. French, 4 E. D. Smith, 458; Minturn vs. Fisher, 4 Cali., 35; Morrison vs. Bailey, 5 Ohio State, 13. (In a later case the question was held to turn on the intention of the parties: Andrew vs. Blackley, 11 Ohio State, 89.) Bowen vs. Newell, 4 Selden, 190, overruling 5 Sandf. 326; Woodroof vs. Merchants Bank, 6 Hill, 174, on error from 26 Wood., 673; Bradley vs. Hamilton, 5 Harrington, 305; Marzette vs. Williams, 1 Barn. & Ad., 415.

Doubtless the usage of the bank would be considered to determine the questions arising where there exists a general usage, but a usage strictly local would not prevail against the principle stated.<sup>1</sup>

In *Ivory vs. Bank of the State of Missouri*, 36 Missouri, 475, the paper in question was dated 12th October, 1860, was addressed to "The Southern Bank of St. Louis," and ran:

"Pay to M. C. Jackson & Co., or order, five hundred dollars, on 22d October."

The bank receiving the draft for collection presented it on October 22d, and payment being refused, it was held liable for negligence for not presenting it on the 25th, allowing grace. The court said: "This bill is neither payable at sight nor on demand, but on a day certain; and it was therefore entitled to grace, and it was negligence to present it before grace had expired."

In *Henderson vs. Pope*, 39 Ga., 361, the following instrument was held to be a bill of exchange entitled to grace, and not a check:

"Atlanta, Georgia, August 4th, 1866. Georgia National Bank, of Atlanta, Georgia. Ninety days after date, pay to F. R. Bell, or order, one thousand dollars.

(Signed,)

MASSEY & HERTY."

§ 23. It makes no difference (independent of any statutory regulation) whether a check be post dated or ante dated, and it is still payable according to its express terms. The drawing of post-dated checks is an every day occurrence in the commercial cities; and the uniform understanding of parties is, that when the check is post-dated—say as of the 14th January, when actually drawn on the 1st—that it is payable on the day it purports to be, even though it be negotiated beforehand.<sup>2</sup>

§ 24. A check given for a debt is not considered as payment until cashed.<sup>3</sup> Even presentment at bank and acceptance has been held no payment,<sup>4</sup> and more evidence is required to prove that a check

<sup>1</sup>*Bowen vs. Newell*, 4 Seld., 190; 5 Sandf., 326; 2 Duer., 584; 3 Kern., 290; *Morrison vs. Baily*, 5 Ohio St., 13; *Woodroof vs. Merchants Bank*, 25 Wend., 673; 6 Hill, 174.

<sup>2</sup>*Taylor vs. Sip*, 1 Vroom, 284; *Mohawk Bank vs. Broderick*, 10 Wend., 304; S. C. 13 Wend., 133; *Matter of Brown*, 2 Story, 502; *Salter vs. Burt*, 20 Wend., 205. Independent of the Stamp Act, the rule is likewise in England: Story on Prom. Notes, 490; *Whister vs. Foster*, 32 L. J.; C. P., 161; 14 C. B.; N. S., 238, (108 E. C. L. R.); *Austin vs. Bunyard*, 34 L. J., 217; *Allen vs. Keeves*, 1 East, 435.

In England, the Stamp Act has led to much controversy as to post-dated checks, which it is unnecessary to discuss here: See 2 Parsons, N. and B., 69, 71; Byles on Bills, p. —, and numerous cases referred to.

<sup>3</sup>*The People vs. Baker*, 20 Wend., 602. <sup>4</sup>*Barnett vs. Smith*, 10 Foster, 256.

given to take up a note is received in satisfaction and discharged, than is demanded where one note is given for another.<sup>1</sup> The holder of a bill or note is not bound to give it up on receipt of a check, until it is paid.<sup>2</sup> In *Taylor vs. Wilson*, 11 Metcalf, 44, it was said: "Whether a check shall operate as payment or not depends upon two facts—*First*, That the drawer has funds to his credit in the bank on which it is drawn; and, *Second*, That the bank is solvent; or, in other words, pays its checks and the bills duly drawn upon it, on demand."

Receiving a dishonored check for a debt does not effect the creditor's original rights and remedies.<sup>3</sup>

In *Russell vs. Honkey*, 6 T. R., 12, it was held that a banker in London to whom Bills of Exchange had been sent for collection, by his correspondent in the country, was not guilty of negligence towards his correspondent in giving them, upon receipt of checks drawn upon a banker in London, though the checks were dishonored for want of funds. The decision was based upon the ordinary usages in London. But in *Byles on Bills*, (Am. Ed.), 24, it is said not to be usual at this day with London bankers to exchange bills for checks, and it is doubtful whether they would now be protected in so doing.

In *Whitney vs. Esson*, 99 Mass., 310, it was held that, although it might be a common practice among men dealing on their own account to take checks in discharge of bills, such a practice fell short of a usage applying to the collection of drafts for absent parties. And that, by taking a check in such a case, the party receiving it, as agent, made himself liable for any resulting loss.

§ 25. There is a class of checks which has recently sprung up in our commercial communities, of a peculiar character, and known as memorandum checks; in their form they do not differ from ordinary checks, and as to third parties who are holders *bona fide*, for a valuable consideration, without notice, they are affected with all the legal rights, and consequences of ordinary checks.<sup>4</sup> But between the

<sup>1</sup> 2 Pars., N. and B., 86, and cases cited.

<sup>2</sup> *Hansard vs. Robinson*, 7 B. and C., 90; *Moore vs. Barthrop*, 1 B. and C., 5; 2 Pars., N. and B., 85.

<sup>3</sup> *Ex-parte Blackburn*, 10 Vesey, 204; *Brown vs. Kewley*, 2 B. and P., 518; *Barnet vs. Smith*, 10 Foster, 256; 2 Pars., N. and B., 85–6, and cases cited.

<sup>4</sup> *Dykers vs. Leather Bank*, 11 Paige, 612, in which it was said: "The weight of the testimony is, that this memorandum, 'which was the insertion of the word *mem*,' amounts to nothing more than an indication of an understanding that the check is not



parties thereto, they seem designed as a mere memorandum of an indebtedment, generally for money borrowed, and are in the nature of the common due bills I. O. U.<sup>1</sup>

The difference in form between the ordinary and the memorandum check, is, that the latter usually has the insertion of the word "mem," which is used to indicate the understanding between the immediate parties.<sup>2</sup> Sometimes the name of the bank is cancelled;<sup>3</sup> but whether the word "mem," constitute the only mark on its face, or the bank's name be cancelled in addition, the effect of the memorandum check is to create an absolute contract of the maker to pay the *bona fide* holder, unconditionally, and not upon the condition of presentment at the bank, non-payment and notice, the formalities being regarded as waived.<sup>4</sup>

In *Franklin Bank vs. Freeman*, 16 Pick., 535, the check sued on was in form as follows:

"Market North Bank, Memo.:

"1000 dolls. — cts.

BOSTON, Aug. 27, 1833.

"Pay to payable, Friday, 30 inst., or bearer, one thousand dollars, <sup>100</sup>.

"To the Cashier,

BENJ. FREEMAN."

The word "North" had two lines run through it. The Court said: "A memorandum check is a contract, by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. The word 'memorandum,' written or printed upon the check, describes the nature of the contract with precision."

According to the Massachusetts cases, the erasure of the name of the bank destroys the presumption of consideration which attaches to an ordinary check;<sup>5</sup> but proof of *value given*, and *bona fides*,

to be presented immediately for payment, so as to destroy the drawer's credit with the bank, when he has not provided funds to meet the draft:" *Franklin Bank vs. Freeman*, 16 Pick., 535.

<sup>1</sup> Language of Story on Promissory Notes, § 499.

<sup>2</sup> *Dykers vs. Leather Bank*, 11 Paige, 612; *Franklin Bank vs. Freeman*, 16 Pick., 535.

<sup>3</sup> *Ball vs. Allen*, 15 Mass., 433; *Ellis vs. Wheeler*, 3 Pick., 18.

<sup>4</sup> *Franklin Bank vs. Freeman*, 16 Pick., 535; *Dykers vs. Leather Bank*, 11 Paige, 612.

<sup>5</sup> *Ball vs. Allen*, 15 Mass., 433.



authorizes a recovery against the drawer of a regular memorandum check, in which the name of the bank is cancelled.<sup>1</sup>

A check in the ordinary form can not be shown by parol evidence to be a memorandum check, and not intended for presentment; and so excusing the holder from presenting before he charged the drawers.<sup>2</sup>

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<sup>1</sup>Ellis *vs.* Wheeler, 3 Pick., 18.

<sup>2</sup>Kelley *vs.* Brown, 4 Gray, 108.

### *Rights of a bona fide Purchaser, or Holder of a Negotiable Instrument.*

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§ 1. It is a general principle of the Law Merchant, that, as between the immediate parties to a negotiable instrument—parties between whom there is a privity—the consideration may be inquired into; and that as to them the only superiority of a bill or note over other unsealed evidences of debt is, that it *prima facie* imports a consideration.

We propose herein, to consider the relations of the purchaser or holder of the instrument, who has acquired the instrument from or through an original party, and to show when, and under what circumstances, he may be affected by fraud or illegality in, or failure of the original consideration.

By “purchaser” and “holder” of a negotiable instrument, is included any one who has acquired it in good faith for a valuable consideration, from one capable of transferring it, and the following propositions may be considered as settled principles of Commercial Law—principles which have been reiterated by the Supreme Court of the United States, and prevail throughout the Union.

*First.* That the purchaser or holder of a negotiable instrument who has taken it *bona fide* for a valuable consideration in the ordinary course of business, when it was not overdue, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument although it may be without any legal validity as between the antecedent parties.

*Second.* That the possession of a negotiable instrument, carries title with it to the holder. The possession and title are one and inseparable.

*Third.* That the burden of proof lies on the person who assails the right claimed by the party in possession.

*Fourth.* That suspicion of defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title.

But these propositions are subject to the following limitations, or qualifications: *First*: That when it is shown by the defendant that the instrument originated in fraud, the burden of proof will be shifted to the holder, and he must then show that he is a *bona fide* holder for value. *Second*: When it is shown that the instrument was given for a consideration which by statute is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent. *And Third*: That no party can enforce a negotiable instrument if it be not genuine, or if it be executed by a party incapable of entering into the contract in which it was given.

Let us consider now, these principles in their order. In some respects they are so interwoven with each other, that it is impossible to sever and disconnect them. But we will endeavor to present as nearly as practicable under separate heads the several elements which must combine to panoply with the full protection of the law, the party who acquires a negotiable instrument. And first we will endeavor more particularly to define, who is a *bona fide* purchaser, or holder for value.

§ 2. Any holder to whom the instrument is made payable for a legal consideration, such as money or other value, and any party who has purchased it from another, or who has received it in payment of a pre-existing debt, or as collateral security for a debt, is considered a *bona fide* purchaser or holder within the rule.

A banker who is accustomed to make advances or acceptances from time to time, for his customers, and has in his possession negotiable securities belonging to them for collection, is deemed a holder for value, not only to the extent of such advances and acceptances already made by them, either specifically or upon account, but also for future responsibilities incurred on the faith of them.<sup>1</sup>

A person paying a bill or note, (not *supra* protest for the honor of a party,) without the request of the party from whom it is due, can not claim the privileges of a *bona fide* holder for value<sup>2</sup>

§ 3. For a long time the doctrine prevailed that if the purchaser or holder took the negotiable instrument under suspicious circumstances, or without due caution or inquiry, although he gave value for it, yet that mere circumstance deprived him of the character of a

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<sup>1</sup> *Bosanguet vs. Dudman*, 1 Stark, 1; *Ex parte Bloxham*, 8 Vessey, 531; *Sperring's Appeal*, 10 Barr., 235; *Story on Bills*, §§ 133, 192.

<sup>2</sup> *Willis vs. Hobson*, 37 Maine, 403.

*bona fide* holder without notice.<sup>1</sup> But this doctrine has been overruled by more recent decisions, on account of its interference with the free circulation of negotiable instruments; and it is settled by great weight of authority that mere negligence, however gross, not amounting to willful and fraudulent blindness, and abstinence from inquiry, will not amount to *mala fides*, or notice, although it may be one of the evidences of it.<sup>2</sup>

§ 4. The case of *Murray vs. Lardner*, 2 Wallace, 110, before the United States Supreme Court, in 1864, fully illustrates the doctrine of the text, and shows the gradual growth of the principle. In that case it appeared that Lardner, who did business in Philadelphia, owned certain negotiable coupon bonds of the Camden & Amboy R. R. Company; and that, on the night of the 23d February, 1859, they were stolen from his office in Philadelphia, and on the next day negotiated to Murray, a broker in New York, for value. Lardner sued in detinue to recover the bonds, in the U. S. Circuit Court for the Southern District of New York, and obtained judgment. To the instructions of the Court that the burden of proof rested on the defendant to show that he received the paper without notice of the theft, and that it was for the jury to say whether there were such circumstances in the negotiation as would warrant the inference that there was ground of suspicion. Murray excepted, and the Supreme Court sustained his exception. Mr. Justice Swaine, who delivered the

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<sup>1</sup> Gill vs. Cubitt, 3 Barn. and C., 466; Snow vs. Peacock, 3 Bing., 406; Beckworth vs. Correll, 3 Bing., 444; Strange vs. Wigney, 6 Bing., 677; Down vs. Halling, 4 B. and C., 330; Hatch vs. Searles, 31 Eng. L. and Eq., 219.

Gill vs. Cubitt was followed in a number of American cases; Sandford vs. Norton, 14 Vt., 228; Hall vs. Hale, 8 Conn., 336; Boyd vs. McIver, 11 Ala., 822; Nicholson vs. Patten, 13 La., 213; Pringle vs. Phillips, 5 Sandf., 157; Hoebrook vs. Mix, 1 E. D. Smith, 154; Grenaux vs. Wheeler, 6 Texas, 515; Cone vs. Baldwin, 15 Pick., 545.

<sup>2</sup> Goodman vs. Harvey, 4 Ad. and E. (31 E. C. L.,) 870; Raphael vs. Bank of England, 33 Eng. L. and Eq., 276; Arbonin vs. Anderson, 1 Ad. and E., 498; May vs. Chapman, 16 M. and W., 355; Palmer vs. Richards, 1 Eng. L. and E., 529; Goodman vs. Simonds, 20 Howard, 343; Bank of Pittsburg vs. Neal, 22 Id., 96; Murray vs. Lardner, 2 Wall, 110; Gwynn vs. Lee, 9 Gill, 138; Brush vs. Scribner, 11 Conn., 368; Worcester Bank vs. Dorchester & M. Bank, 10 Cush., 488. But see Merriam vs. Granite Bank, 8 Gray, 254, and Cone vs. Baldwin, 12 Pick., 545; Matthews vs. Poythress, 4 Ga., 287; Ellicott vs. Martin, 6 Md., 509; Commercial, &c., Bank vs. First Nat. Bank, 30 Md., 11; Grenaux vs. Wheeler, 6 Texas, 515; Pelmont Branch Bank vs. Hoge, 35 N. Y., 65 (overruling Pringle vs. Phillips, 5 Sandf., 157); Story on Bills, §§ 416 and 194; 1 Pars. N. and B., 259.

opinion, disapproved *Gill vs. Cubitt*, 3 Barn and C., 466, and quoted with approval, *Goodman vs. Harvey*, 4 Ad. & El., 870, in which Lord Denham said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." And considering that the good faith of Murray in the transaction had not been impeached, decided in his favor.<sup>1</sup>

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<sup>1</sup> In his opinion it was said by Mr. Justice Swayne:

"What state of facts should be deemed inconsistent with the good faith required, was not settled by the earlier cases. In *Lawson vs. Weston*, Lord Kenyon said: 'If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000.'

"In the later case of *Gill vs. Cubitt*, Abbott, Chief Justice, upon the trial, instructed the jury, 'That there were two questions for their consideration: first, whether the plaintiff had given value for the bill, of which there could be no doubt; and, second, whether he took it under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given the full value for it, they ought to find a verdict for the defendant.' The jury found for the defendant, and a rule nisi for a new trial was granted. The question presented was fully argued. The instruction given was unanimously approved by the court. The rule was discharged, and judgment was entered upon the verdict. This case clearly overruled the prior case of *Lawson vs. Weston*, and it controlled a large series of later cases.

"In *Crook vs. Jadis*, the action was brought by the indorsee of a bill against the drawer. It was held that it was 'no defense that the plaintiff took the bill under circumstances which ought to have excited the suspicion of a prudent man that it had not been fairly obtained; the defendant must show that the plaintiff was guilty of gross negligence.'

"In *Blackhouse vs. Harrison*, the same doctrine was affirmed, and *Gill vs. Cubitt* was earnestly assailed by one of the judges. Patterson, Justice, said: "I have no hesitation in saying that the doctrine laid down in *Gill vs. Cubitt*, and acted upon in other cases, that a party who takes a bill under circumstances which ought to have excited the suspicion of a prudent man can not recover, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently,

There must be guilty knowledge or willful ignorance of defect to impeach the holder's title.

§ 5. The purchaser or holder must have acquired the instrument

or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I never could understand that a party who takes a bill *bona fide*, but under the circumstances mentioned in *Gill vs. Cubitt*, does not acquire a property in it. I think the fact found by the jury here that the plaintiff took the bills *bona fide*, but under circumstances that a reasonably cautious man would not have taken them, was no defence.'

"In *Goodman vs. Harvey*, the subject again came under consideration; Lord Denham, speaking for the court, held this language: 'I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff, without any proof of bad faith in him, there is no objection to his title.'

"A final blow was thus given to the doctrine of *Gill vs. Cubitt*. The rule established in this case has ever since obtained in the English courts, and may now be considered as fundamental in the commercial jurisprudence of that country;

"In this country there has been the same contrariety of decisions as in the English courts, but there is a large and constantly increasing preponderance on the side of the rule laid down in *Goodman vs. Harvey*.

"The question first came before this court in *Swift vs. Tyson*. *Goodman vs. Harvey*, and the class of cases to which it belongs, were followed. The court assumed the proposition, which they maintain to be too clear to require argument or authority to support it. The ruling in that case was followed in *Goodman vs. Simonds*, and again in the *Bank of Pittsburg vs. Neal*. In *Goodman vs. Simonds*, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions:

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

"The burden of proof lies on the person who assails the right claimed by the party in possession.

"Such is the settled law of this court, and we feel no disposition to depart from it. The rule may perhaps be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and willful ignorance alike involve the result of bad faith. They are the same in effect. Where there is no fraud there can be no question. The circumstances mentioned, and others of a kindred character, while inconclusive in themselves, are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is fatal to the title of the holder.

(in order to stand on a better footing than his transferrer) for a valuable consideration.<sup>1</sup> And it must be such a consideration as does not by its inadequency indicate that the transferrer held under some defective or fraudulent title. Thus, where the plaintiff knew that the defendant was able to pay, bought his note for \$300 of a third party, for \$5, and there was want of consideration in the original transaction, it was held that the nominal price was constructive notice of the defect in the paper itself.<sup>2</sup>

§ 6. The phrase, "in the ordinary or usual course of business," is used to describe such a transfer as is usual according to the custom of merchants. The phrase has been used in many cases in this sense,<sup>3</sup> and the questions have been much debated whether or not the mak-

"The rule laid down in the class of cases of which *Gill vs. Cubitt* is the antetype, is hard to comprehend and difficult to apply. One innocent holder may be more or less suspicious under similar circumstances at one time than at another, and the same remark applies to prudent men. One prudent man may also suspect where another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs. The rule established by the other line of decisions has the advantage of greater clearness and directness. A careful judge may readily so submit a case under it to the jury that they can hardly fail to reach the right conclusion.

"We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep-rooted and wide-branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction. In *Miller vs. Race*, Lord Mansfield placed his judgment mainly on the ground that there was no difference in principle between bank notes and money. In *Grant vs. Vaughn*, he held that there was no distinction between bank notes and any other commercial paper. At that early period his far-reaching sagacity saw the importance and the bearings of the subject.

"The instruction under consideration in the case before us is in conflict with the settled adjudications of this court."

The like doctrine is maintained in the following cases: *Commercial & F. National Bank vs. First National Bank*, 39 Md., 11; *Woodman vs. Churchill*, 52 Me., 58.

<sup>1</sup>See *post*.

<sup>2</sup>*Dewett vs. Perkins*, 22 Wis., 473.

<sup>3</sup>*Miller vs. Race*, 1 Burr., 457; *Littell vs. Marshall*, 1 Rob. (La.), 51; *Davis vs. Miller*, 14 Grat., 1; *Evans vs. Smith*, 4 Binn., 366.



ing or transferring of paper to secure an old debt,<sup>1</sup> or for the accommodation of another, are such mercantile transactions as carry the full protection of the law. The U. S. Supreme Court takes the affirmative view of both questions,<sup>2</sup> and the rule is settling down to that effect. The assignment of a negotiable instrument by operation of a bankrupt or insolvent law, is one of the instances in which it may pass in a manner out of the usual course of business.<sup>3</sup>

To be entitled to protection against all defects which would avail as defenses between antecedent parties, the holder must have taken it before it was over due.<sup>4</sup> If not paid when it became due, it is considered as dishonored; and although still transferable, yet the fact apparent upon its face, is equivalent to notice to the taker that he takes it subject to its infirmities, and acquires no better title than his transferrer. There is always a presumption when the payee's name is indorsed on the paper, that it was done while current; and likewise always a presumption that the holder received it before maturity.<sup>5</sup>

But the indorsement is almost invariably without date and without witnesses, and therefore the presumption that it was made, and that the holder acquired the instrument before maturity, is of the slightest kind, open to be blown away by the slightest breath of suspicion.<sup>6</sup>

While it is the general rule that if the paper be overdue at the time of the transfer, that circumstance of itself is notice, and he can acquire no better title than his indorser; yet if the indorser's title were unimpeachable, the fact that the paper was executed for accommodation without consideration, and that the indorsee knew it, is no defense even when the paper was

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<sup>1</sup>See *post*.

<sup>2</sup>*Surft vs. Tyson*, 16 Peters, 1; *Goodman vs. Simonds*, 20 Howard; *Violett vs. Patton*, 5 Cranch, 142.

<sup>3</sup>*Billings vs. Collins*, 44 Maine, 271.

<sup>4</sup>*Davis vs. Miller*, 14 Grat., 1; *Arents vs. Commonwealth*, 18 Grat., 750; *Texas vs. Hardenberg*, 10 Wallace, 58.

<sup>5</sup>*Leland vs. Farnham*, 25 Vt., 553; *Walker vs. Davis*, 33 Maine, 516; *Burnham vs. Wood*, 8 N. H., 334; *Ranger vs. Cary*, 1 Metc., 369; *Dickerson vs. Burke*, 25 Georgia, 225; *McMahon vs. Bremend*, 16 Texas, 331; *Barrick vs. Austin*, 21 Barb., 241; *Cook vs. Helms*, 5 Wis., 107.

<sup>6</sup>*Gibson J.*, in *Snyder vs. Riley*, 6 Barr., 164, *Hill vs. Kroft*, 29 Penn. St., 186.



over-due at the time of the indorsement,<sup>1</sup> it being considered that parties to accommodation paper hold themselves out to the public by their signatures to be bound to every person who shall take the same for value, to the same extent as if paid to him personally.<sup>2</sup> If the holder received the paper after maturity from an indorser who took it *bona fide* before maturity, there is no question as to his right to recover;<sup>3</sup> but if he takes it after maturity from the party for whose accommodation it was made, indorsed or accepted, there is conflict of decision on the subject;<sup>4</sup> but the doctrine of the text is sustained by the highest authority.

A note payable by installments is over due when the first installment is over due and unpaid, and he who takes it afterwards, takes it subject to all equities between the original parties.<sup>5</sup> But where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is over due and unpaid.<sup>6</sup>

A purchaser of a negotiable instrument, before the close of business hours, on the last day of grace, and before its dishonor, has been held, and as we think correctly, to be fully protected as having

<sup>1</sup>Fisher vs. Leland, 4 Cush., 456, in which Shaw, C. J., says: "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation? why is it not paid? Here is something wrong. Therefore, although it does not give the indorser notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defense which might be made if the suit were brought by the indorser."

See also, Davis vs. Miller, 14 Grat., 1; Arents vs. Commonwealth, 18 Grat., 750; Texas vs. Hardenberg, 10 Walla., 68.

<sup>2</sup>This doctrine seems just and is sustained by numerous authorities but not without conflict. Favoring it, see Story on Notes, § 194; Story on Bills (Bennett's Ed.), § 188, 191; 2 Rob. Prac., (New Ed.), 253; Byles on Bills, (Sharwood's Ed.), 285; Sturtevant vs. Ford, 4 M. & G., 101; 4 Scott, 608; Charles vs. Marsden, 1 Taunt., 224; Lazarus vs. Cowie, 3 Q. B., 459, (43 E. C. L. R.); Caruthers vs. West, 11 Ad. & El., 144; In Redfield & Bigelow's Lead. Cas., 216-17, it is said: "To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which, upon every principle of justice and fair dealing, he should be compelled to abide by."

<sup>3</sup>Howell vs. Crane, 12 La. An., 126; Story on Bills, § 188.

<sup>4</sup>Chester vs. Dorr, 41 N. Y., 279.

<sup>5</sup>Vinton vs. King, 4 Allen, 562.

<sup>6</sup>Boss vs. Hewitt, 15 Wisc., 260.

received it while current;<sup>1</sup> but a contrary view has been taken in Massachusetts.<sup>2</sup>

§ 8. It has been observed that the holder of negotiable paper, in order to be entitled to recover, must be without "notice" of any fraud or illegality in or failure of the consideration of the paper affecting the party from whom he received it; and the word notice in this connection signifies the same as knowledge. Knowledge of such fraud or illegality, impeaches the *bona fides* of the holder, and destroys his title irrespective of the amount he may have paid for the paper.<sup>3</sup>

Mere knowledge, however, of the want of consideration between previous parties will not alone impair the purchaser's position. Accommodation paper is daily placed in market for sale, and an indorsee who knows that a bill or note, still current, was drawn, accepted or indorsed without consideration, is as much entitled to recover as if he were ignorant of the fact.<sup>4</sup> Nor is it a good ground of defense against a *bona fide* holder for value, that he was informed that the note was made or the bill accepted in consideration of an executory contract, unless he was also informed of its breach.<sup>5</sup> If he has such knowledge he can not recover.<sup>6</sup> And if any one purchase accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated, he is not a *bona fide* holder as against the party who lent his name for accommodation.<sup>7</sup> The defense must not only show that the paper was diverted from its purpose, but also that such diversion was known to

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<sup>1</sup>Crosby vs. Grant, 36 N. H., 273.

<sup>2</sup>Pine vs. Smith, 11 Gray, 38. It did not appear in this case whether or not the transfer was during business hours, nor did the court seem to attach any importance to the inquiry.

<sup>3</sup>Fisher vs. Leland, 4 Cush., 456; Norvell vs. Hudgins, 4 Munf.; Kasson vs. Smith, 8 Wend., 437; Skilding vs. Warren, 15 Johns., 270; Harrisburg Bank vs. Meyer, 6 Serg. & R., 537.

<sup>4</sup>Grant vs. Ellicott, 7 Wend., 227; Powell vs. Waters, 17 Johns., 176; Grandin vs. Leroy, 2 Paige, 509; Bank of Ireland vs. Beresford, 6 Dow., 237; Mentross vs. Clark, 2 Sandf., 115; Cronin vs. Kellogg, 20 Ill., 11; Charles vs. Marsden, 1 Taunt., 224.

<sup>5</sup>Davis vs. M'Cready, (3 Smith,) 17 N. Y., 230; Craig vs. Sibbeth, 15 Penn. St., (3 Harris,) 238; Bond vs. Wietze, 12 Wis., 611; In Harris vs. Nicholls, 26 Ga., 413, it is held that failure of consideration may be pleaded against a transferee, who took the note with knowledge of the contract, and that the consideration was liable to fail. The doctrine of the text, however, seems sound in reason and authority.

<sup>6</sup>Coffman vs. Wilson, 2 Met., (Ky.) 542.

<sup>7</sup>Small vs. Smith, 1 Denio., 583; Thompson vs. Posten, 1 Duvall, 415.

the holder when he receives it, misapplication is not such fraud as shifts the burden of proof.<sup>1</sup> And it is immaterial that the paper was not used in precise accordance with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied.<sup>2</sup>

When there is a full consideration for the acceptance of a bill, it is not material whether it be applied according to original agreement or to another purpose.<sup>3</sup>

But if before paper executed without consideration, is negotiated, or while in the hands of a party affected with its infirmity, the purchaser be expressly warned by the accommodation party not to take it—that it is without consideration, and will not be paid, he will then not be entitled to recover.<sup>4</sup>

§ 9. What extraneous circumstances amount to notice of defect in the consideration, or title, of bills of negotiable paper has been much discussed, and variously decided. If the holder had actual information of the infirmity it would be; he could stand on no footing superior to that of his assignor or indorser, and parol or other extrinsic evidence, is admissible to show that he possessed such information. Thus, in *Norvell vs. Hadgins*, 4 Munf., 496, the defendant gave the plaintiff notice not to take the instrument, telling him that he had made it without consideration and should not pay it, and also gave notice at the Bank that it might not be discounted; and it was held that the

<sup>1</sup>*Stoddard vs. Kimball*, 6 Cush., 469; *Robertson vs. Williams*, 5 Munf., 331; *Gray vs. Bank of Kentucky*, 29 Penn. St., 365.

<sup>2</sup>*Mohawk Bank vs. Corey*, 1 Hill, 513. In this case the indorsers for accommodation, indorsed for the purpose of enabling the maker to get the note discounted at a particular Bank. The maker used it to take up notes on another Bank. The Court said: "Within the proper legal sense of the term, there has been no diversion of the note from the purpose for which it was made and indorsed. The indorsers lent their names for the purpose of giving the maker credit, generally and without any concern with the use which should be made of that credit."

In *Wardell vs. Howell*, 9 Wend., 170, Sutherland, J., said: Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser can not object that it was not effected in the precise manner contemplated at the time of its creation. \* \* But where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder can not recover upon it against an accommodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration.

<sup>3</sup>*Moore vs. Ward*, 1 Hilton, 337.

<sup>4</sup>*Norvell vs. Hadgins*, 4 Munf., 496; *Dogan vs. Dubois*, 2 Richardson Eq., 85.

plaintiff on these and other grounds, could not recover. But express notice is not indispensable, and it is sufficient if there were such circumstances as invited inquiry, if a jury think that the abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the bill.<sup>1</sup> But gross negligence, unless it amount to proof of fraud, is insufficient, as we have already seen, to impeach the holder's title.<sup>2</sup>

When there is nothing on the face of the instrument to give notice of any defects, the fact that a deed of trust securing its payment contains recitals which show that equities or off-sets exists between the original parties does not weaken the position of a *bona fide* holder without actual notice.<sup>3</sup> And if it be not overdue, the fact that it was in litigation at the time of transfer does not affect the transferee's rights; nor will a decree when rendered affect them, the doctrine of *lis pendens* not applying to negotiable instruments.<sup>4</sup> When transferred overdue pending litigation, it is subject to the issue of the suit.<sup>5</sup>

§ 10. In like manner the holder can acquire no better title, nor can he stand upon a better footing than the party from whom he receives it, when he has taken the paper after and with notice of its dishonor for non-acceptance, or non-payment. If the paper bear the marks of its dishonor upon it, whether they indicate refusal to accept or pay, the holder receives it as said in *Goelman vs. Harvey*, 4 Ad. & El., 870, "with a death wound apparent on it."

In *Andrews vs. Pond*, 13 Peters, 65, it was said that: "a person who takes a bill, which upon the face of it was dishonored, can not be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under the circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." The same doctrine was enforced in *Fowler vs. Brantly*, 14 Peters, 318, where, in speaking of a promissory note so marked as to show for whose benefit it was to be discounted, and that discount had been refused, the Supreme Court held that all those dealing in paper "with such marks on its face, must be presumed to have knowledge of what it imported."

<sup>1</sup>Byles on Bills, (Sharswood's Ed.,) p. 226.

<sup>2</sup>See *ante*.

<sup>3</sup>Minell vs. Read, 26 Ala., 736.

<sup>4</sup>Kellogg vs. Fancher, 23 Wis., 21; Hill vs. Kraft

29 Penn. St., 186; Winston vs. Westfeldt, 22 Ala., 760.

<sup>5</sup>Kellogg vs. Fancher, 23 Wis., 21.

the holder when he receives it, misapplication is not such fraud as shifts the burden of proof.<sup>1</sup> And it is immaterial that the paper was not used in precise accordance with agreement, when it does not appear that the accommodation party had any interest in the transaction in which the paper was to be applied.<sup>2</sup>

When there is a full consideration for the acceptance of a bill, it is not material whether it be applied according to original agreement or to another purpose.<sup>3</sup>

But if before paper executed without consideration, is received or while in the hands of a party affected with its infirmity, the purchaser be expressly warned by the accommodation party not to take it—that it is without consideration, and will not be paid, he will then not be entitled to recover.<sup>4</sup>

§ 9. What extraneous circumstances amount to notice of the infirmity of the consideration, or title, of bills of negotiable paper has been discussed, and variously decided. If the holder had actual notice of the infirmity it would be; he could stand on no footing other than that of his assignor or indorser, and parol or other extrinsic evidence is admissible to show that he possessed such information. In *Norvell vs. Hadgins*, 4 Munf., 496, the defendant gave notice not to take the instrument, telling him that he was without consideration and should not pay it, and also to the Bank that it might not be discounted; and it was

<sup>1</sup>*Stoddard vs. Kimball*, 6 Cush., 469; *Robertson vs. Williams*, 5 Ky., 365.

<sup>2</sup>*McHawk Bank vs. Corey*, 1 Hill, 513. In this case the indorsement was for the purpose of enabling the maker to get the money from a particular Bank. The maker used it to take up notes on another Bank. The court said: "Within the proper legal sense of the term, there has been no change of the note from the purpose for which it was made and indorsed. The indorsement was for the purpose of giving the maker credit, generally and not for the use which should be made of that credit."

In *Wardell vs. Howell*, 9 Wend., 170, Sutherland, J., said: "The indorsement effected the substantial purpose for which it was designed by the accommodation indorser can not object that it was not effected in the manner contemplated at the time of its creation. \* \* But where a note is indorsed for its original destination, and fraudulently put in circulation by an agent, the holder can not recover upon it against an accommodation indorser showing that he received it in good faith, in the ordinary course of business, for a valuable consideration."

<sup>3</sup>*Moore vs. Ward*, 1 Hilton, 537.

<sup>4</sup>*Norvell vs. Hadgins*, 4 Munf., 496; *Dogan vs. Dubois*, 2 R.

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· B., 244.

Cummins, 2 M'Lean, 98;  
1. St., 294; Perin *vs.* Noyes,  
*vs.* Holmes, 10 Johns., 231;  
*vs.* Armstrong, 7 Ala., 256;  
22; Kelly *vs.* Ford, 4 Iowa,  
well, 13 M. & W., 73; Story

make an unencumbered title to the purchaser. Confiding in these representations, Lane executed his promissory notes for about \$14,000, and Johnson assigned one of said notes for \$652.40 to John L. Vathir, who brought suit upon it, and recovered judgment against Lane. Lane obtained an injunction to this judgment; and it appeared that Johnson's representations as to the value of the lots were false; and besides that, he could make no title to them, it having reverted to the city of St. Louis in default of his payment of the purchase money. Said Allen, J.: "As a general rule, the indorsement of a negotiable note is of itself, *prima facie* evidence that the indorsee has paid value for it. But when the payee has procured the note by fraud, this general presumption is rebutted, and the holder can not recover without proving that he has paid value. The reason on which this exception to the general rule rests, is briefly stated by Parke, B., in *Bailey vs. Bidwell*, 13 Mees. & Wels., 73: "It certainly" he says, "has been the universal understanding since the later cases, that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of some other person to sue upon it; and that such proof casts upon the holder the burden of showing that he was a *bona fide* holder for value."<sup>2</sup>

Nor is the requisition for such proof confined to cases in which the note was put into circulation by fraud, as where it was lost or stolen. In the case of *Rogers vs. Morton*, 12 Wend. R., 484, the note was voluntarily given for an assumed balance, on a settlement of accounts. The balance was in part made up by a charge for a draft, of which the creditor was never holder; and proof of this fraud committed on the makers at the time the note was given, was held sufficient to throw upon the plaintiffs the burden of showing that they were *bona fide* holders for value.<sup>3</sup> It was held incumbent on Vathir to give proof accordingly to this view.

§15. In *Wilson vs. Lozier*, 11 Grat., 478, it appeared that Rector sold to Wilson & Mills, with general warranty, real estate in Washington county, Ohio, and received in part payment the note of

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<sup>1</sup>6 Grat., 246; *Wilson vs. Lozier*, 11 Grat., 477.

<sup>2</sup>*Munroe vs. Cooper*, 5 Pick. R., 412; *Rogers vs. Morton*, 12 Wend. R., 484; *Holme vs. Kanper*, 5 Binn. R., 469.

<sup>3</sup>See also, *Thomas vs. Newton*, 2 Carr. & Payne, 606.



Wilson, which he transferred as a gift to the Trustees of Rector College, in Taylor county, Virginia. Previous to the assignment, Rector had mortgaged the real estate aforesaid, to the Ohio Life and Trust Company, and it had been sold, and so the consideration had entirely failed.

The Trustees of the College assigned the note to Wright & Baldwin, who sold it to William Lazier, who indorsed it to another party and was sued upon, and paid it. The bill prayed that the contract for the sale of the land might be rescinded, and the note cancelled. Daniel, J.: "There is no evidence of fraud in the origin or negotiation of the note; and the mere failure of consideration does not impose on the innocent holder the onus of showing the consideration he gave for the note. In note to Chitty on Bills, 10th Am. Ed., p. 648, we have a report of the case of *Whitaker vs. Edmonds*, 1 Mood. & Rob., 366. In that case, Peterson, Judge, said: "Since the decision of *Heath vs. Lansem*, 2 Bar. & Adol., 291, 22 Eng. C. L. R., 78, the consideration of the Judges has been a good deal called to the subject; and the prevalent opinion among them is that the Courts have of late gone too far in restricting the negotiability of bills and notes. If indeed the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he became possessed of it. So far I accede to the case of *Heath vs. Lansem*, for there were in that case, circumstances raising a suspicion of fraud; but if I added on that occasion that, even independently of these circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, *I am now decidedly of opinion that such doctrine was incorrect.*"

§ 16. In the case of *Welch vs. Lindo*, 7 Cranch, 159, decided by the Supreme Court of the United States in 1812, it was held that the mere possession of a promissory note by an indorsee, who had indorsed it to another, while the indorsement remained, was not sufficient evidence of his right of action against his indorser without a re-indorsement or receipt from his last indorsee—Marshall, C. J., delivering the opinion of the court. But in the case of *Dugan vs. United States*, 3 Wheat., 172, decided in 1818, this case was overruled; and in rendering the opinion of the court, it was said by Liv-



ington, J.: "After an examination of the cases on this subject, (which can not all of them be reconciled,) the court is of opinion, that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come in possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill or not, as he may think proper.<sup>1</sup>

§ 17. When the instrument was originally void, because made upon a consideration void by law, as for instance in violation of the statute against gaming or usury, it is an absolute nullity; and although in form negotiable, no currency in the market and no innocence or ignorance of the holder, can impart any vitality to it.<sup>2</sup>

It is said, also, that if the instrument was executed under duress, the mind of the party never consenting to the act, it could not be enforced by a *bona fide* holder for value.<sup>3</sup>

Sometimes the statute declares a note void only as between original parties, and in such cases the *bona fide* purchaser is not affected by the illegality;<sup>4</sup> and when the instrument was executed upon an illegal consideration, especially if illegal by statute, (but not absolutely avoiding the instrument,) it throws upon the holder the burden of proving *bona fide* ownership for value.<sup>5</sup> But a failure of consideration does not throw this burden upon him.<sup>6</sup> And, in all

<sup>1</sup>United States vs. Barker, 1 Paine C. C., 156; Norris vs. Badger, 6 Cowen, 449; Brinkley vs. Going, 1 Breese, 288; Campbell vs. Humphries, 2 Scam., 478; Bank of United States vs. United States, 2 How., 711; Mottram vs. Mills, 1 Sandf., 37; Hunter vs. Kibble, 5 McLean, 279; Dollfus vs. Frosch, 1 Denio, 367.

<sup>2</sup>Bayley vs. Taber, 5 Mass., 286; Aurora vs. West, 22 Ind., 88; Vallett vs. Parker, 6 Wend., 615; Taylor vs. Beck, 3 Rand., 316; Wend vs. Bond, 21 Georgia, 195; Hall vs. Wilson, 16 Barb., 548; Ramsdell vs. Morgan, 16 Wend., 574.

<sup>3</sup>Duncan vs. Scott, 1 Camp., 100; 1 Parsons N. & B., 276.

<sup>4</sup>Paton vs. Coit, 5 Mich., (1 Cooley,) 505.

<sup>5</sup>Paton vs. Coit, 5 Mich., (1 Cooley,) 505; Wyat vs. Campbell, 1 Mood. & M., 80; Bailey vs. Bidwell, 13 Mees & W., 74; Northam vs. Latouche, 4 Car. & P., 140; Harvey vs. Towers, 6 Exch., 656; Smith vs. Braine, 16 Q. B., 201; Fitch vs. Jones, 32 Eng., L. & Eq., 134; Vallett vs. Parker, 6 Wend., 615; Story on Bills, § 193; Doe vs. Burnham, 11 Foster, 426; Johnson vs. Meeker, 1 Wis., 436; Norris vs. Langley, 19 N. H., 423.

<sup>6</sup>Wilson vs. Lazier, 11 Grat., 478, and cases cited.

cases, where the statute does not declare the instrument *void*, and *bona fide* ownership for value being proved, the holder is entitled to recover.<sup>1</sup>

And so if an agent exceed his authority in signing the name of his principal to a bill or note, the *bona fide* holder can not recover.<sup>2</sup>

§ 18. When the instrument is forged, and not genuine to all intents and purposes<sup>3</sup>—if it has been materially altered<sup>4</sup>—the purchaser or holder can not enforce it, for the defendant has only to say, *this is not my promise (non haec in foedera veni.)* And if the defendant were incapable of contracting the debt for which the negotiable instrument was given, his incapacity can not be cured by the ignorance or innocence of any one supposing him to be capable. Infancy, coverture and lunacy are instances of such incapacity.<sup>5</sup>

§ 19. There are some cases in which the line of demarcation between the fraud which does not affect the *bona fide* holder, and the illegality which utterly vitiates the instrument in any hands, is narrow and difficult to distinguish—cases in which some infirmity of the party has made him subject to imposition, and which deduces the principle which protects him from the same source as that which protects one under duress.

The party who has been induced by fraud to execute his bill or note, may be compelled to pay it by a *bona fide* holder, because where one of two innocent parties must suffer, the loss falls on the one who made it practicable. The defect of judgment, the law can not protect; but if some natural infirmity were practiced upon, the principle no longer applies. The party is then in no default of judgment, and the law shields him from imposition.

In *Whitney vs. Sharp*, 2 Lansing, 477, a *bona fide*, for value, and without notice of any defect, brought suit on a promissory note, and

<sup>1</sup>*Williams vs. Cheney*, 3 Gray, 215; *Hubbard vs. Chapin*, 2 Allen, 328; Story on Promissory Notes, § 192.

<sup>2</sup>*Andover vs. Crafton*, 7 N. H., 298; *Weathered vs. Smith*, 9 Texas, 622; *Fearn vs. Filica*, 7 Man. & G., 513.

<sup>3</sup>*Canal Bank vs. Bank of Albany*, 1 Hill, 287.

<sup>4</sup>*Master vs. Miller*, 4 Term R., 320; *Woodworth vs. Bank of America*, 19 Johns., 331; *Nazro vs. Fuller*, 24 Wend., 374; *Lisle vs. Rogers*, 18 B. Monroe, 528; *Bumpass vs. Timms*, 3 Sneed, 459.

<sup>5</sup>*Parsons N. & B.*, 276.

the defendant offered to prove in evidence that he was unable to read, and that when he signed the note, it was represented to him, and he believed that it was a certain other contract, offered to be also produced in evidence, and which purported to be of an entirely different character. The Supreme Court of New York, (overruling the decision of the lower court,) held that the evidence was admissible, and presented a sufficient defense; Talcott, J., saying: "A *bona fide* holder of commercial paper, for value and before maturity, is protected, in many cases, against defenses which are perfectly available against the original parties, such as that the signature was obtained by false and fraudulent representations; that the paper has been diverted; that a blank bill or acceptance has been filled up for a greater amount than the party to whom it was delivered was authorized to insert, &c. But in all these cases, the party *intended* to sign and put in circulation the instrument as a negotiable security; where this is the case, he is bound to know that he is furnishing the means whereby third parties may be deceived and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts. But, while this is a rule of great convenience and propriety, there are and must be some limits to its application, some defenses as to which even a *bona fide* purchaser, purchases at his peril. \* \* \* The true distinction was tersely stated by Bovill, Ch. J., in *Foster vs. McKinnen*, (38 Law Journal Rep. N. S., p. 310), interrupting counsel *arguendo* who was stating the proposition, that where the plaintiff proves he is a *bona fide* holder for value, it is immaterial that the signature of the defendant was obtained by fraud. "That," said the Chief Justice, "is where the defendant intended to put his name to an instrument which was a bill."<sup>1</sup>

§ 20. As to the extent of the recovery by the *bona fide* holder for value, if the defense be want of consideration between the original or intermediate parties, he may still recover the whole amount of the bill or note, although he purchased it at a considerable discount, (greater than legal interest;)<sup>2</sup> but if the defense be that the

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<sup>1</sup>This doctrine is based upon the same foundation as that stated by Parsons, C. J., in *Putnam vs. Sullivan*, 1 Mass.: "That, perhaps, if a blind man had a note falsely and fraudulently read to him, and he indorsed it supposing it to be the note read to him, he would not be liable as indorsee, because he is *not guilty of any laches*."

<sup>2</sup>*Moore vs. Baird*, 30 Penn. St., 138; *Gaul vs. Willis*, 26 *Id.*, 259.

bill was uttered in fraud, or was lost or stolen, then even such a holder can only recover what he advanced for it.<sup>1</sup>

§ 21. It is well settled that where one receives by indorsement from the holder, the bill or note of a third party, as collateral security for a debt contracted at the time, he is a *bona fide* holder in the usual course of business, and is protected against any equity existing between antecedent parties.<sup>2</sup>

It is also well settled that if the bill or note is transferred as collateral security for a pre-existing debt, and a previous security is released or returned, or there is any contract express or implied for delay of collection of the previous debt until the collateral matures, or there is any new consideration for such transfer, the transferee is a holder in the usual course of business, and free from equities.<sup>3</sup>

If, when a pre-existing debt has fallen due, the bill or note of a third party is transferred to and accepted as payment by the creditor, he is a *bona fide* holder for value;<sup>4</sup> but when such paper is trans-

<sup>1</sup>Chicopee Bank vs. Chapin, 8 Met., 40; Bond vs. Fitzpatrick, 4 Gray, 89; Williams vs. Smith, 2 Hill, (N. Y.,) 301; Valette vs. Mason, 1 Smith, (Ind.,) 89; Allaire vs. Hartshorne, 1 Zabriskee, 665; Holeman vs. Hobson, 8 Humph., 127; Wippen vs. Roberts, 1 Esp., 231; Edwards vs. Jones, 7 Carr. & P., 633; Robins vs. Maidstone, 4 Ad. & El., 811; Story on Bills (Bennett's Ed.), 188.

<sup>2</sup>Collins vs. Martin, 1 B. & P., 648; Munn vs. McDonald, 10 Watts, 270; Watson vs. Cabat Bank, 5 Sand., 423; Williams vs. Smith, 2 Hill., 301; Griswold vs. Davis, 31 Vt., 390; Ferdon vs. Jones, 2 E. D. Smith, 106; Bank of New York vs. Vanderhorst, 32 N. Y., 553; Stotts vs. Byers, 17 Iowa, 303; Lyon vs. Ewings, 17 Wis., 61; Curtis vs. Mohr, 18 Id., 617.

<sup>3</sup>Goodman vs. Simonds, 20 Howard, 370; Swift vs. Tyson, 16 Peters, 1; Griswold vs. Davis, 31 Vt., 390; Chicopee Bank vs. Chapin, 8 Met., 40; Prentiss vs. Graves, 33 Barb., 621; Ontario Bank vs. Worthington, 12 Wend., 513; Prentice vs. Zane, 2 Grat., 262; Bertrand vs. Barkman, 8 Eng. Ark., 150; Cullum vs. Branch Bank, 4 Ala., 21; Roxborough vs. Messick, 6 Ohio St., 448; Cook vs. Helms, 5 Wis., 107; Payne vs. Bensley, 8 Calif., 260; Allaire vs. Hartshorne, 1 N. J., 665; Park Bank vs. Watson, 3 Hand., 490, (42 N. Y.); Brown vs. Leavitt, 31 N. Y., 113; Fenby vs. Pritchard, 2 Sand., 151; Agrault vs. McQueen, 32 Barb., 305; Palmer vs. Richards, 1 Eng. L. & Eq., 529; Petrie vs. Clark, 11 S. & R., 377; Okie vs. Spencer, 2 Whart., 253; Housem vs. Rogers, 40 Penn. St., 190; Trustees vs. Hill, 12 Iowa, 462; Jenkins vs. Schant, 14 Wis., 1; 1 Pars N. & B., 224; Story on Bills, § 19.

<sup>4</sup>Yongs vs. Lee, 18 Barb., 187, 2 Kernan, 551; Carlisle vs. Wishart, 11 Ohio, 172; Norton vs. Waite, 20 Maine, 175; Bostwick vs. Dodge, 1 Dong., (Mich.,) 413; Brush vs. Scribner, 11 Conn., 388; Barney vs. Earle, 13 Ala., 106; Bush vs. Peckard, 3 Harrington, 385; Dixon vs. Dixon, 31 Vt., 450; Emanuel vs. White, 34 Miss., 56; Stevens vs. Campbell, 13 Wis., 315; Struthers vs. Kendall, 5 Wright, 214; Kellogg vs. Fancher, 23 Wis., 21.

ferred as collateral security for such debt, there is diversity of opinion as to the effect of the transfer. In England the transferee is held to be protected against equities,<sup>1</sup> and the United States Supreme Court has followed the English rule.<sup>2</sup>

In the State tribunals, there is much diversity and conflict of opinion, but we consider that the weight of reason and of authority (if not the number of cases) sustains the Supreme Court, and the Courts of England, in their views.<sup>3</sup> The contrary opinion is based upon the idea that the paper is not transferred in the usual course of business according to some decisions, and that there is no valuable consideration for the transfer according to others, (the original debt being neither extinguished or suspended,) and has been adopted through a series of cases in New York and a number of the States.<sup>4</sup> But the fallacy of this view was well exposed in the case cited below.<sup>5</sup>

<sup>1</sup>Peacock *vs.* Purcell, 14 C. B., n. s., 728; Poirer *vs.* Morris, 20 Eng. L. & Eq., 103; Percival *vs.* Frampton, 2 Crompt., M. & R., 180; Heywood *vs.* Watson, 4 Bing., 496; Bosanquet *vs.* Forster, 9 Carr. & P., 659; Kearslake *vs.* Morgan, 5 T. R., 514; Baker *vs.* Wolker, 14 Mees & W., 465.

<sup>2</sup>Swift *vs.* Tyson, 16 Peters, 1, *obiter dictum*. Bank of Metropolis *vs.* New England Bank, 1 How. U. S., 234.

<sup>3</sup>Atkinson *vs.* Brooks, 26 Vt., 574; Allen *vs.* King, 4 McLean, 128; Fisher *vs.* Fisher, 98 Mass., 303; Stoddard *vs.* Kimball, 6 Cush., 469; Ives *vs.* Farmers Bank, 2 Allen, 236; Bank of Republic *vs.* Carrengton, 5 R. I., 515; Cobb *vs.* Doyle, 7 R. I., 550; Boatman's Savings Institution *vs.* Holland, 38 Mo., 49; Cecil Bank *vs.* Heald, 25 Md., 562; Gibson *vs.* Connor, 3 Kelly, 47; Reddick *vs.* Jones, 6 Iredell, 107; Outhwite *vs.* Porter, 13 Mich., 533; Valette *vs.* Mason, 1 Smith (Ind.), 89; Osgood *vs.* Thompson Bank, 30 Conn., 27; Conkling *vs.* Vail, 31 Ill., 166; Foy *vs.* Blackstone, *Id.*, 538; Naglee *vs.* Parrott, 14 Calif., 450. See an exhaustive Essay on this subject, confirmatory of these views in Redfield & Biglow's Leading Cases, 195-217, 3 Kent. Com., 96.

<sup>4</sup>Okie *vs.* Spenser, 2 Whart., 253; Walker *vs.* Geisse, 4 Whart., 252; Depeau *vs.* Waddington, 6 Whart., 220; May *vs.* Quinby, 3 Bush., (Ky.) 96; Alexander *vs.* Springfield Bank, 3 Met., (Ky.) 534; Wormley *vs.* Lowry, 1 Humph., 468; Notter *vs.* Stover, 4 Hubbard, 163; Fenoville *vs.* Hamilton, 35 Ala., 319; King *vs.* Doolittle, 1 Head., 77; Ryan *vs.* Chew, 13 Iowa, 589; Jenkins *vs.* Schaub, 14 Wis., 1.

<sup>5</sup>In Blanchard *vs.* Stevens, 3 Cush., 162, Dewy, J., said: "If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities or perhaps payment in money. It is a fallacy to say, that, if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed, not proved, and from the very nature of the case, is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper, seem to require and justify the rule that when a person takes a negotiable note not

§22. When the simple fact appears that the party holds a bill or note as collateral security, it seems that there is no certain implication that the original debt is suspended. If the bill or note be of the same or greater amount than the previous debt, there is an implied suspension until its maturity;<sup>1</sup> and if there be an express agreement for a suspension, or circumstances from which a jury may infer one, then there is no substantial difference between a holder who has accepted the paper in payment, and one who has taken it as collateral security. But whether there be such express or implied agreement for suspension, makes no difference. The creditor becomes a party to the paper with all the responsibility of an indorsee in the legal sense of the word, and that of itself is a sufficient consideration to protect him as a *bona fide* purchaser.<sup>2</sup>

§23. It seems, however, from reason and authority, that the following exceptions exist to the rule, that the holder of paper as collateral security, is a holder for value free from equities:

1. If the bill or note be transferred as collateral for a debt not yet due, and upon no new consideration, the transferrer may withdraw it from his creditor, the transfer being regarded as without consideration, and the creditor as not a holder *for value*.<sup>3</sup>

2. If the bill or note be taken by the transferee merely to collect for the debtor, to apply when collected, the creditor not becoming a party by indorsement, so as to be required to make demand, and give

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overdue or apparently dishonored, and without notice actual or otherwise, of want of consideration or other defense thereto, whether in payment of a precedent debt or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defence might not have been effectual as between the original parties thereto."

<sup>1</sup>Michigan State Bank vs. Leavenworth, 28 Vt. 209; Atkinson vs. Brooks, 26 Vt., 569.

<sup>2</sup>In Poirier vs. Morris, 20 Eng. L. Eq., 103, Lord Campbell, C. J., said: "There is nothing to make a difference between this and a common case, where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." Crampton, J., said: "Whether the bill was a collateral security, or whether it has the effect of suspending the payment of the antecedent debt, is quite immaterial."

See also, Belshaw vs. Bush, 11 C. B., 191; Ford vs. Beech, 11 Q. B., 852.

In Peacock vs. Purcell, 14 C. B., n. s., 728, the indorsees of a bill as collateral security for a previous debt, failed to present it when due. It was held that this discharged the parties bound; Byles, J., saying: "That as depositors of the bill, as they had the rights (one of which must be to exclude equitable defenses) so they had the duties of holders."

<sup>3</sup>Atkinson vs. Brooks, 26 Vt., 569, Redfield & Bigelow's Lead. Cas., 202.



notice, he is to be regarded as a mere agent of the transferrer, and not as a *bona fide* holder in the legal sense of the term.<sup>1</sup>

3. Also, if the collateral be not negotiable, or if the negotiable paper be taken without indorsement, although while still current and indorsed after it falls due equitable defenses will not be excluded.<sup>2</sup>

4. If the debtor is notoriously insolvent before the note or bill is transferred as collateral security, the creditor it is said, can only stand in the shoes of the debtor.<sup>3</sup>

§ 24. In *Goodman vs. Simonds*, 20 Howard, 370, the United States Supreme Court adopted and enforced an affirmative view of the second branch of this question, holding that where new notes were given in payment of prior indebtedness, and collaterals previously held were surrendered, and the time of payment was extended and definitely fixed by the terms of the notes showing an agreement to give time for the payment of a debt already overdue, and then transfers a bill of exchange as collateral security for the notes, the holder of the bill was a holder for value. And, said Clifford, J.: "a suspension of an existing demand is frequently of the utmost importance to the debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration."<sup>4</sup> The surrender of other instruments, although held as collateral security, is also a good consideration; and this as well as the former proposition, is now generally admitted and is not open to dispute.<sup>5</sup>

It seems now to be agreed that, if there was a present consideration at the time of the transfer independent of the previous indebtedness, that a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the

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<sup>1</sup>*Allen vs. King*, 4 McLean, 128; *Atkinson vs. Brooks*, 26 Vt., 574; *Austin vs. Curtis*, 31 Vt., 64; *Warren vs. Lee*, 2 Selden, 144; *Scott vs. Ocean Bank*, 23 N. Y., 289; *Palmer vs. Richards*, 1 Eng. L. & Eq., 529; *De La Chaumette vs. Bank of England*, 9 B. & C., 208.

<sup>2</sup>*Lancaster National Bank vs. Taylor*, 100 Mass., 18; *Van Wort vs. Woolley*, 3 B. & C., 439; *Whitler vs. Foster*, 14 Cem. B., n. s., 248; *Boody vs. Bartlett*, 42 N. H., 558; *Franklin vs. Twogood*, 18 Iowa, 515. <sup>3</sup>*Atkinson vs. Brooks*, 26 Vt., 569.

<sup>4</sup>*Etting vs. Vanderlyn*, 4 John., 237; *Morton vs. Burn*, 7 Ad. & El., 19; *Baker vs. Walker*, 14 Mees. & Well., 465; *Jennison vs. Stafford*, 1 Cush., 168; *Walton vs. Maccall*, 13 Mees. & Well., 453; *Wheeler vs. Slocum*, 16 Pick., 62.

<sup>5</sup>*Dupeau vs. Waddington*, 6 Whar., 220; *Hornblower vs. Prond*, 2 Barn. & Ald., 327; *Rideout vs. Briston*, 1 Crompt. & Jer., 231; *Bank of Salina vs. Babcock*, 21 Wend., 409; *Youngs vs. Lee*, 2 Kern., 551.

facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties—at least to the extent of the previous debt for which it is held as collateral.<sup>1</sup> And the better opinion seems to be in respect to parol contracts as a general rule that there is but one measure of the sufficiency of a consideration, and consequently whatever would have given validity to the bill as between the original parties is sufficient to uphold a transfer like the one in this case. We are not aware that the principle as thus limited and qualified is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of delivery, and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case.<sup>2</sup> A contrary rule prevails in New York, according to several decisions, and also in Tennessee.<sup>3</sup> It is settled that it is a sufficient consideration in Massachusetts, Vermont and New Jersey, and such was the opinion of the late Justice Story, in *Swift vs. Tyson*, in his valuable treatise on “Bills of Exchange.”<sup>4</sup>

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<sup>1</sup>White vs. Springfield Bank, 3 Sand. S. C., 222; New York M. Iron Works vs. Smith, 4 Duer, 362.

<sup>2</sup>Poirier vs. Morris, 20 Eng. L. & Eq., 103; Byles on Bills, pp. 96, 127.

<sup>3</sup>Coddington vs. Bay, 20 Johns., 637; Stalker vs. McDonald, 6 Hill, 93; Napier vs. Elam, 5 Yerger, 108.

<sup>4</sup>Stoddard vs. Kimball, 6 Cush., 469; Story on Bills, sec. 192; Chicopee vs. Chapin, 8 Met., 40; Blanchard vs. Stevens, 3 Cush., 162; Atkinson vs. Brooks, 26 Ver., 569; Allaire vs. Hartshorne, 1 Zab., 665.



### *Law of Fixtures, in the Form of Buildings.*

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The law of fixtures, especially in the form of buildings, seems to be in a distressing state of uncertainty; partly from the variety of forms in which the improvements may be made, and partly from the different application of the same rules between parties standing in different relations to each other.

The general principle in relation to fixtures is well expressed by the Supreme Court of Tennessee in several cases. "It is a well-established rule," they say, "of the common law, that everything affixed to the freehold passes with the freehold; and the rigor of the rule is only relaxed in exceptional cases." *Childress vs. Wright*, 2 Cold., 350; *DeGraffenreid vs. Scruggs*, 4 H., 454. It is equally agreed on all hands, that the exceptions to the rule are most restricted as between executors and heirs; have a wider though "limited range" between tenant for life and remainder-man, who stand toward each other in independent attitudes; and are most liberally allowed as between landlord and tenant for years: 2 Smith's Leading Cases, 256. The difficulty is in ascertaining the limits of the range of exceptions as between the parties standing in the attitude of tenant for life and remainder-man. For, between executors and heirs the general rule retains its utmost rigor, while between landlord and tenant the exceptions are the most latitudinarian. The doubt is as to the intermediate class.

In the consideration of the subject, the easiest course will be to see first how far the exceptions to the general rule have gone in favor of a tenant for years. And certainly the relaxation of the general rule as between these parties, has been carried very far. The learned American editor of Smith's Leading Cases, in his notes to *Elwès vs. Mawé*, 3 East., thus sums up the law: "The privilege of the tenant seems, at one time, to have been limited to fixtures erected for the benefit of trade, but it now embraces additions to the freehold made for ornament, pleasure or convenience; and may extend to structures, or even buildings of a durable and substantial kind, if so constructed that they can be taken away without serious or irreparable injury to

themselves, or the premises of which they form a part: *Van Ness vs. Pacard*, 2 Pet., 143; *Grymes vs. Bowen*, 6 Bing., 437; *Marston vs. Roe*, 2 E. & Bl., 257; *Omboy vs. Jones*, 19 N. Y., 234." \* \* \*

"The limits of the rule are, however," he adds, "obscure and ill-defined; and it would seem not to apply to any edifice which is so constructed as to justify the belief that it is meant to be a permanent addition to the freehold, or that can not be removed in such a condition as to be fit for use elsewhere." Citing *Cutter vs. Kirk*, 2 Wall., 491; *Reid vs. Kirk*, 12 Rich., 54; 11 Ohio, N. S., 482. On the preceding page, 2 Sm. L. C., 258, the same learned editor has this paragraph: "And the decisions will, perhaps, fully establish that every addition or improvement made by a tenant, which can be severed without placing the freehold in a worse condition than it was when the term began, may be removed at or before its termination, without regard to the cause or motive of the erection." But he again adds: "A different view was, however, taken in *Reid vs. Smith*, 12 Rich., 54; and in *Omboy vs. Jones*, 19 N. Y., 234, 240. The general rule, under which everything that is affixed to the freehold becomes part of it, was said to prevail even between landlord and tenant, except where the circumstances are such as to create an exception, and to preclude the removal of out-houses or buildings erected during the continuance of the lease, although resting on pillars or tressels, and not let into the soil, unless they were built for the furtherance of the trade or business of the lessee, *and not merely with a view of adding to the yearly value or income from the land by being leased or used for dwellings.*"

It will be seen that the learned editor, while laying down the law most favorably for the tenant, and showing that the tendency of modern decisions is to still greater latitude, concedes that the actual decisions have not yet gone to the extent claimed.

Mr. Washburne, in his work on Real Property, page 114, confines the exception in favor of tenants within narrower limits. "A structure," he says, "erected by a tenant for years, of whatever size or material it may be, may be removed though [*sic*: but the sense requires "if," or, "whether it be,"] erected and used for purposes of agriculture or manufacture." And one of the cases cited by him, which is not referred to by the editor of Sm. L. C., namely, *McCullough vs. Irvine*, 13 Penn., 438, is so much to the point that a quotation from the opinion of the court will not be out of place. "A two-story

brick house and a large bank barn (the building in controversy) are not instruments or implements of any trade. They are great conveniences which enable men of all sorts to enjoy the fruits of their labor or trade. If you make them an exception, the rule itself is obliterated, and nothing is essentially of the realty except the earth itself and that which is in its bowels. The exceptions have been carried very far by some decisions of the Eastern States, particularly in *Whitney vs. Barton*, 4 Pick, 310; *Holmes vs. Tremper*, 20 J., 29; and *Van Ness vs. Pacard*, 2 Pet., 143. It is, however, in somewhat loose expressions of the court in these cases, and not from the cases themselves, that the principle asserted derives some countenance. The first, where the dicta are the most latitudinarian, was merely the removal of a padlock and some loose boards, about which there never could have been any reasonable doubt. The second was the removal of a cider press by the tenant, and there, no reasonable doubt of its being an implement for the manufacture of cider; could be entertained. The last case runs to a little more magnitude, for it was removing a sort of a house, but a house erected for the manufacturing of a commodity; and the decision goes expressly upon the ground of its not being a dwelling-house. None of these cases, either expressly or by implication, overrule *Elwes vs. Mawe*, 3 East., in which it was held that an agricultural tenant could not remove, during the continuance of the lease, a beast house, carpenter shop, and fuel house, erected for the use of the farm, even though he left the premises as he found them."

When we examine the cases bearing directly upon the right of a tenant for years to remove buildings erected by him during the term, we find that they may be divided into classes. One of these classes is, like *Wansborough vs. Maton*, 4 A. & E., 884, and *Clemence vs. Steere*, 1 R. I., 272, where the structure in controversy is held to be, not a fixture, but a chattel such as a small out-building resting in the soil by its own weight; and the decisions seem to be based upon that ground alone. Another class, making the exception to the general rule, turns upon the fact that the buildings were put up for the purpose of trade or manufacture, or *principally for these purposes*. In this class are cases in which the exception has been extended to occupations having an affinity or resemblance to trade, but not strictly included in that term according to the usual definitions. The two strongest cases of this character are *Van Ness vs. Pacard*, 2

Pet., 143, and *Ombony vs. Jones*, 19 N. Y., 234. The first of these was the case of a building erected on a rented lot in Washington City, on the foundation of a stone cellar, with brick chimney, used as a dwelling for the tenant and his family, and for the making of butter. The decision is placed upon the ground that the erection was made *principally* for the purpose of trade; and it was conceded by the court, that, "if the house were built principally for a dwelling for a family, independently of carrying on the trade, then it would doubtless be deemed a fixture, falling under the general rule, and immovable." The case of *Ombony vs. Jones*, was that of a tavern-keeper at a summer resort, who erected a large ball-room on stone piers sunk in the ground; and the decision was placed on the principle that the building of a ball-room might be deemed in furtherance of the trade of a tavern-keeper.

The actual decisions do not sanction the idea that even a tenant for years can remove buildings erected for his personal accommodation as a dwelling, or for the purpose of yielding an income by being rented. *Van Ness vs. Pacard* is directly in point against the right of removal of a house erected *principally* for a dwelling. And Chancellor Walworth intimates, in *Winship vs. Pitts*, 3 Paige, 259, that a lessee for years would not be entitled, without the permission of his landlord, to remove a building erected during the term, where it was not erected for the purpose of trade, and so as to be removed without affecting the freehold. It was also admitted in the argument for the tenant in the leading case of *Elwes vs. Mawe*, "that not even persons renting premises for the purpose of carrying on a trade (much less ordinary lessees) have any privilege to remove permanent additions and improvements made by a tenant to the old dwelling-house or out-buildings, or even new ones of that sort erected by him for his personal accommodation."

Mr. Washburn limits also, as we have already seen, the removal of buildings to those erected for the purpose of agriculture or trade where they are attached to the freehold. And the American editor of the notes to Sm. L. C., on the page already cited, says, that even *Ombony vs. Jones* admits that the tenant can not remove "out-houses or buildings, although resting on pillars or tressels, and not let into the soil, unless they were built for the furtherance of the trade or business of the lessee, and not merely with a view of adding to the

*yearly value or income from the land by being leased or used as dwellings."*

These limitations seem to be correct in principle, and to offer a practical rule of discrimination between buildings which the tenant may, and those which he may not, remove. And unless some such distinction be made, the general rule of the common law, with which we started out, is, in the language of the Supreme Court of Pennsylvania, already quoted, "obliterated, and nothing is essentially of the realty except the earth itself, and that which is in its bowels."

The finest buildings are constructed upon foundation walls, and may be taken down to the top of such walls, and often to the bottom rock, without injury to the soil. Accordingly, the tendency of modern decisions is, to make the rights of the parties to fixtures, and buildings in the nature of fixtures, depend, not on the manner in which they are attached to the freehold, but upon the relation of the parties, the intention in erecting the improvements, and the uses to which they are put. Loose machinery in a manufacturing establishment will go to the heirs as against the executor, while the same machinery, firmly attached to the buildings, and even the buildings themselves, belong to the tenant for years as between him and his landlord. So substantial houses built upon stone foundations, with brick chimneys, and indubitably attached to the soil, will, if erected principally for purposes of trade, belong to the out-going tenant for years; while the same buildings, and even buildings resting upon pillars or tressels, and not let into the soil, if erected and used as dwellings, or for the more convenient and profitable enjoyment of the land, will go with the freehold to the landlord, even as against a tenant for years.

Let us now see whether the exceptions to the general rule made in favor of the tenant for years as against his landlord, apply to the tenant for life as against the remainder man. These exceptions, so far, at any rate, as they relate to buildings and fixtures for purposes of trade, do not exist in favor of the executor against the heir. This was decided in *Fisher vs. Dixon*, 12 Cl. & Fin., 312, upon elaborate argument, by the House of Lords, the law lords, Brougham, Cottenham and Campbell, all concurring. This is, also, the recognized doctrine in this country: *House vs. House*, 10 Paige, 158; 11 Barb, 43. But how is it between tenant for life and remainder-man?

Mr. Smith, in his note to *Elwes vs. Mawe*, (2 Sm. L. C., 245,) says: "The indulgence extended to the executors and administrators of tenants for life or in tail, is not so great as that granted in the case of landlord and tenant." But he adds, after citing *Lawton vs. Lawton*, 3 Atk., 13, and *Dudley vs. Ward*, Amb., 113, as belonging to this class, that these cases, coupled with the observations of Lord Mansfield, in *Lawton vs. Lawton*, 1 H. Bl., 260, and the Lord Chief Justice in the principal case, shows that the representative of the particular tenant (tenant for life) is entitled, as against the remainder-man, to fixtures erected wholly or in part for the furtherance of trade." The cases of *Lawton vs. Lawton* and *Dudley vs. Ward*, were both cases of a fire-engine to work a colliery, and the decisions were in favor of the representative of the tenant for life, mainly on the ground, according to Lord Ellenborough, in the principal case, "That where the fixed instrument, engine or utensil (and the building erected to protect the same falls within the principle,) was an accessory to a matter of a personal nature, it should be itself considered as personality." Lord Hardwick, in *Lawton vs. Lawton*, thought the case of a tenant for life came nearer to that of a tenant for years; and he finally decided in favor of the executor of such tenant, principally to encourage trade for public benefit.

The American edition to Sm. L. C., says, p. 256, that, "The rule (of exceptions) has a wider, though limited range, between tenant for life and those in remainder." He cites *Martin vs. Roe*, 40; E. L. & Eq., 68; *Buckley vs. Buckley*, 11 Barb., 43; *White vs. Arndt*, 1 Wh., 1; *Doak vs. Wiswill*, 38 Maine, 569; *Wilde vs. Waters*, 32 E. L. & Eq., 422; *Harkney vs. Sears*, 26 Ala., 403. But these cases, while recognizing the rules as laid down, throw little light upon the limit of its range. The only one of them which attempts a definition, is *Buckley vs. Buckley*. In that case, the learned judge, in the course of his opinion, says: "As-between tenant for life and remainder-man or reversioner, the rule in favor of the realty is, as we have seen, somewhat relaxed. And I am inclined to think that a tenant for life who erects a fixture for the purposes of trade or manufacture, has an equal right, in respect to their removal, with a tenant for years, (Law of Fix., 117), though the cases have, perhaps, not generally gone so far. In *Martin vs. Roe*, which was an action to recover the frames and glass work of a hot-house, brought by the personal representative of a deceased rector against the new incumb-

ent, the counsel of the plaintiff admitted that: "As between remainder-man and tenant for life, the structure might be considered so fixed as to pass with the freehold;" but insisted that the relations between a prior and a succeeding incumbent, who were both tenants for life, were different; and so the Court held, in *Doak vs. Wiswell*, the husband of a dowress was not permitted to recover a "dwelling house and detached barn," erected by him during the life of his wife, upon substantially the same ground assumed by the Supreme Court of Tennessee, in *Marable vs. Jordan*, 5 H., 417, that, owing to the legal existence of the wife being merged in the husband, he can not charge her real estate for money expended by him in making improvements thereon.

Mr. Washburn, in the few sentences devoted to this subject in his work on Real Property, (1 Wash., 114,) is not a whit more satisfactory. "And it would seem," he says, "that a somewhat different rule applies in cases of tenants for life from those for years." But all we can gather from his own remarks, and the substance of the cases as given by him, is, that a tenant for years may remove even *permanent* buildings erected for purposes of agriculture or trade, whereas a tenant for life may not remove "permanent improvements annexed to the freehold" by him, citing *Austin vs. Stevens*, 24 Maine, 520.

Mr. Washburn refers, however, in this connection, to the case of *McCullough vs. Irvine's Executors*, 13 Penn., 438, from which we have already made an extract. In this case an attempt is made by the court to distinguish between the rights of tenants for life and tenants for years as to fixtures in the form of buildings, and to give a reason for the distinction. Tenants for life are usually widows or dowresses, or husbands as tenants by curtesy, or devisees under wills with remainder to children or other blood relations. The persons entitled in remainder, in such cases, are ordinarily those nearest in ties of affection and blood to the tenant of the life estate. It may well be presumed, as between such parties, that improvements put upon the property by the life tenant are not designed for the temporary use of such tenants, but as permanent ameliorations. It would be a poor encouragement to husbandry in the case of farms in the country, or of improvements of realty in cities, to allow the tenants for life, after erecting buildings and enjoying them for a quarter or half a century, to remove them at



the end of a long life, and leave the ground naked, but as valuable as he found it. "We must have many tenancies for life in Pennsylvania," say the Court, "by will, by deed, or by descent; and if the tenant, after having enjoyed the fruit of the land during, perhaps, a long life, may, just before his death, strip it of the fences he has built, and the house and barn he has erected, because the advance in the improvement and commerce of the country would leave the land of as much intrinsic value as when he took possession, and convert it into a solitary waste for the winds to moan over, the tenant of a new generation would have to take the land as it was a generation before, and commence improving *de novo*."

These are cogent suggestions, which commend themselves to our practical good sense. The absence of direct authority in conflict upon a matter of such every day occurrence, is also a weighty consideration. It may be taken, therefore, to be the better law, that a tenant for life, or his representative, is not entitled to remove buildings of a permanent character; and that permanency may be predicated of all buildings which appear, either by the intention of the party erecting them, the manner of attachment to the soil, or the uses to which they are put, to have been designed as additions to the freehold, or to enhance its income or convenience.

The conclusions to be deduced from the authorities may be thus enunciated :

1. The general rule is, that everything affixed to the freehold passes with the freehold, and that the rigor of this rule is only relaxed in exceptional cases.

2. The exceptions to the rule are most restricted as between personal representative and heir; have a wider, though limited, range between tenant for life and remainder-man; and are most liberally allowed between landlord and tenant.

3. An exception does exist in favor of the tenant, as between landlord and tenant, in the case of buildings erected exclusively or principally for the purposes of trade, or in the nature of trade, or out-buildings not attached to the soil.

4. No exception exists, as between such parties, where the buildings are erected for use exclusively or principally as dwellings, or with a view to the beneficial use of the realty, or to increase the annual income.

5. And the exceptions are of a more "limited range" between



tenant for life and remainder-man, and do not extend to buildings of a permanent character, and intended for the beneficial use and enjoyment of the property.

6. And the recent decisions lay little stress, in any of these cases, except where the erection is obviously a mere chattel, upon the mode of attachment to the soil, and more upon the relation of the parties, the intention with which the buildings are erected, and the uses to which they are put.

W. F. COOPER.

*About the Profession and Practice of the Law.*

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The legal profession holds out greater allurements than any other to the aspiring youth of our country. Success in this profession promises not only material emolument, but influence, distinction and prominence for political advancement besides. The lawyers are our ruling class. One of the departments of government, and the one which, in the language of Lord Bacon, especially comes home to the business and bosom of the citizen—the judiciary—belongs to them exclusively. The entire administration of justice is in their hands. And their profession is the broad avenue to the honors of the other two departments of government.

Of our sixteen Presidents, all except Washington, Harrison, Taylor, Johnson and Grant, studied law. All the rest except Madison and Monroe, practiced law; and except Jackson, owed their careers indirectly to their legal studies, which brought them into connection with public affairs. Our Heads of departments have generally been lawyers. So have most of our State Governors, and so, notoriously, have the great majority of our legislators, state and national, so that it may safely be affirmed that the law of the country—not only the application, but also the making of it—is in the hands of the legal profession.

De Tocqueville regarded the lawyers as constituting the aristocracy of America. "In America," said he, "there are no nobles or literary men, and the people are apt to mistrust the wealthy. Lawyers consequently, form the highest political class and the most cultivated circles of society. \* \* \* If I were asked where I placed the American aristocracy, I should without hesitation, reply that it is not composed of the rich, who are united together by no common tie, but that it occupies the Bench and the Bar." In another place he says: "As the lawyers constitute the only enlightened class which the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the Legislative Assemblies; they conduct the administration."

As might be expected, the legal profession is a good deal overstocked. Some embrace it as a stepping-stone to political life; some on account of its social respectability. Many become lawyers because their fathers or relatives are such, and can introduce them into practice. And some college-educated young men enroll themselves in the legal ranks because, having no capital to embark with in any business, and shrinking from the dull routine of a clerk's existence, they see no other resource except a profession, and law appears less distasteful than preaching, or teaching, or medicine. To this illustrious category belongs the writer.

Last summer, being struck with the number of legal signs in one of the large eastern cities, we inquired of a very intelligent and observant young legal friend, how many of these signs signified sure enough lawyers—men who actually made a living at the law. He replied, about one-third. An older lawyer, who happened to be present, said that he thought about one-half. But this gentleman shortly afterwards leaving the room, the other remarked that he would be apt to overstate this proportion, as he had, from the outset of his career, by means of family connections among bankers and merchants, succeeded in obtaining a good practice, and his associations had been among the more prosperous section of the fraternity.

Let any one take the catalogue of the Bar in any city and frequent the Courts, and he will probably be surprised to see how few comparatively of the priesthood of Themis appear to officiate at her altars. However, the conclusions of such an observer would stand in need of some correction. For a good deal of the most desirable sort of business makes little stir in the court-room. Taking judgments on unlitigated claims, or decrees to enforce vendors' liens, or to foreclose mortgages or deeds of trust, or decrees, looking to the laying off of dower, or granting partition, etc.,—all this may be done so quietly as to attract little or no notice, but the noiseless current does not fail to leave its deposit in the professional pocket. And then a good deal of business is done by lawyers outside of the court-room, such as making collections where no suit is brought, compromising suits, which thus never get tried, drawing wills, conveyances, and other instruments, investigating titles to land, etc.,—all of which contributes to the support of the legal host. Still, after making every allowance, the truth remains, that a very large proportion of those who hang out legal shingles, fail to justify the wisdom of their

adoption of the law as their vocation. It may be said here, as it has been with reference to another class, that many are called, but few chosen. That is, comparatively few. For after deducting the large body of merely nominal lawyers, a numerous band yet remains behind.

It is generally supposed that almost all even of the lawyers who succeed, have to undergo a preliminary starvation period. But while it is undoubtedly true that very few at the commencement of their full-fledged lawyer existence are overwhelmed with business, yet we think that the popular idea of the starvation period is much exaggerated. What we read about the English lawyers has contributed to this. But in England, a different state of things exists from that here. There the profession is subdivided. The attorney and the counsellor are different persons, and the same counsel rarely practices at the same time in the courts of law and equity. And then, there are conveyancers, etc., who confine themselves to their respective specialties. Now it is the counsellor who has had to walk through the valley of starvation in England. The explanation of this is simple. His employment had to come through the attorneys. His province was exclusively in the higher walks of the profession, to conduct litigation in the courts and sometimes to give opinions. The young counsellor would not often be called upon to give opinions, of course; and until he could inspire the attorneys, a shrewd and cautious class of judges, with confidence in his possession of that assemblage of equalities which constitutes the able *nisi prius* advocate, including not only book-learning, but dexterity in the practice of the courts, quickness of apprehension, self-possession, sufficient skill in what Dr. Johnson called "the quart and tierce of forensic digladiation," knowledge of men, tact, etc., etc.,—how could he hope to compete with veterans of proved efficiency. Some of these qualities are ordinarily the fruits only of considerable experience, and these would not be apt to be credited to the neophyte. Even if he actually possessed the requisite combination of gifts and acquirements, it took practice to show this, and practice he could only hope for through a reputation itself only to be earned by practice. A vicious circle had to be surmounted. Practice was necessary to obtain practice. And meantime the counsellor was debarred from resorting to any part of that large field of business for which his competence would have been unquestionable, because this was the exclusive province of lower

grades of the profession, and might not be invaded by him. But in America, without losing caste, the lawyer may do anything which in England only the attorney or conveyancer, or special pleader, was liable to be called upon to do. And then, here the lawyer comes into direct contact with the client, and not, as in England, through an attorney, a lawyer of lower grade; and thus the business proper of the counsellor is in the hands of less critical judges, and is more rashly bestowed. So that in America, a lawyer does not have to linger unemployed anything like so long as in England.

We believe that almost anywhere in the United States a young man of good education, who applies himself energetically to the law, with a determination to succeed, may, provided his character is unexceptionable, and his manners and address ordinarily pleasing, contrive to support himself with economy almost from the very outset of his admission to the Bar. Older lawyers would generally be glad to get rid of, by turning over to him, with a division of fees, a good deal of the cheaper and more troublesome business hanging heavily upon their hands, as well as to obtain his assistance in much of the drudgery incidental to the more desirable part of their practice,—such as taking depositions, looking up proof, making searches among records, etc., etc. Our young practitioner would have to make it clear that he would work,—would conscientiously do “up to the very handle,” to use a slang expression, whatever he undertook. But his reputation in this respect once established, our word for it, at least his bread and butter would be safe. And if he was competent for higher service, he would not be long in emerging into a higher professional stratum.

But many young lawyers are unwilling to apply themselves, at first, to the dregs of practice. They have adopted the law as a gentlemanly calling. They want to enjoy at once the prestige of the profession; to appear in the public eye; to act as counsellors, and to flourish in damage suits and criminal trials. Many of them interest themselves too early in politics, the Delilah of lawyers. In a word they are amateurs, and amateurs never succeed. It is not only the kingdom of heaven which must be taken by violence,—that is, by vehement, ardent pursuit. The law is well worthy of this. It is for those who by natural fitness and by acquirements and capacity for labor and perseverance, are qualified for success, upon the whole an attractive calling. “Unless,” said Rufus Choate, “one takes hold of

the law with determination to be a great lawyer, it's a poor concern and uninteresting; but a love of it may be begotten. After mastering its rudiments, it is, with all its rewards, as interesting and attractive as any other department of serious, laborious thought." As to the number of its votaries, it must be remembered that while the basement of the professional edifice is crowded, and even the next floor is pretty full, yet, in the language of Daniel Webster, "There is a plenty of room in the upper story." And the prizes there stored are surely sufficient to stimulate all the ambition of the most aspiring.

We have some advice to offer to young men who wish to become lawyers. We must insist upon, at least, a good solid English education as a preliminary basis. A little Latin, though not absolutely necessary, may yet be considered as "necessary and proper," in the liberal, constitutional sense of these words, seeing that in our mother country the law once spoke in Latin, and much of its terminology and many of its most pithy maxims are still in that tongue; though it is such Latin as would undoubtedly have made Quinctilian stare and gasp, and have plunged Cicero into as deep despair of fathoming its full significance, as Sir Thomas Moore's law Latin thesis did that continental, George Francis Train, who challenged him to dispute upon any question which he himself might propound. We would especially insist upon a thorough mathematical drilling, at least as far as through Euclid, or some equivalent geometrical treatise. No other exercise of the logical faculty is at all comparable with a course of geometry. Geometry is the purest system of applied logic. Plato had inscribed over the door of the Academy: "Let no one unskilled in geometry enter here." We would urge the student also to master some good hand-book of logic. Whately's will answer. And let him, if possible, read, at least Sir William Hamilton's Lectures upon metaphysics. And we would strongly recommend to him the logic of John Stuart Mill. This is one of the greatest of the products of English thought. Mr. Mill takes an extensive view of the province of logic. He regards it as the science of inference; as concerned with the relevancy and sufficiency of evidence in every department of knowledge, and with the auxiliary matters of definition, division, classification, etc., as well as the syllogistic process.

The mental training imparted by the study of metaphysics and logic, and that perfect system of applied logic, geometry, results in

the faculty of splitting one's matter into distinct, clearly conceived, propositions; of building up these into a well-compacted argument; and of analyzing with facility the argument of an opponent into its component implied propositions, and detecting, as with the touch of an Ithuriel's spear, whatever fallacies may have been deftly interwoven into the tissue. In other words, it develops the faculties of analysis and synthesis. Metaphysics investigates analytically the primal elements of thought. Logic elucidates the laws governing the mind in drawing conclusions from data. And geometry is the best gymnastics of ratiocination.

These subsidiary studies are invaluable to the lawyer, so large a portion of whose function is to show the sufficiency or insufficiency of reasoning and evidence to establish conclusions. We speak from our own experience, of their power to augment the natural strength of the faculties concerned in this task. The man who has made these studies will always be firmly conscious of superiority over him who has not, unless the latter makes up the difference by larger natural gifts. Of course, no sort of training can equalize a mind of inferior order with one of a higher order.

We would advise our young friend, if possible, to attend a law school. There, being in a class with others, his emulation would be excited; he would be stimulated to read more closely, knowing that his proficiency was to be tested in the recitation-room; and then, in the quiet seclusion of a law school, he would be exempt from everything calculated to divert his mind from his studies. And these are helps which it would not be wise to forego voluntarily.

The mind is so constituted that in a short period of exclusive, absorbing application far more progress may be made in any study than in a very much longer time where other subjects come in for a share of attention; and this, even though the hours of application throughout the longer time far exceed, in the aggregate, the period of exclusive application. In a quarter of an hour a man might commit to memory a poem which he might read once every day for a year or longer without committing. In ten minutes of earnest application a proposition in geometry may be mastered which could not be mastered by going over it, with half the mental stress, for a much longer time. An intense heat makes an impression in a few moments which a less degree would never make at all. And where a subject is extensive, and in order to make further progress, that



which has already been made must be firmly held, the necessity of keeping the mind saturated with it until it has been fully comprehended is apparent. A legal friend in Baltimore once related to us his experience in studying German. He said that when he commenced he gave to it the unintermitting devotion of six weeks. His mind became wholly absorbed in it. German words, to use his own expression, would churn up and down in his memory. Afterwards, for several years, he studied the language for a portion of every day, the aggregate time given to it being much more than the first period of exclusive application. But he said he made more real progress in the first six weeks than throughout all the subsequent time. Now, at the law school the student may bestow a continuous, uninterrupted attention to legal studies which would hardly be possible elsewhere.

Moreover, at a law school he is most likely to become thoroughly grounded in the fundamental principles of the law considered as a science, and to acquire the habit of taking a scientific view of legal questions, the want of which, by the way, is a defect in some lawyers whose abilities we regard with the highest admiration, leading them to rely unduly on mere case-hunting.

The tendency to lean too much upon precedent is the special weakness of the legal mind in England and America. De Tocqueville was struck with this. "The English and American lawyer," said he, "investigate what has been done. The French advocate inquires what should have been done. The former produces precedents; the latter reasons. A French observer is surprised to hear how often an English and American lawyer quotes the opinions of others, and how little he alludes to his own. The reverse occurs in France. There the most trifling litigation is never conducted without the introduction of an entire system of ideas peculiar to the counsel employed, and the fundamental principles of law are discussed in order to obtain a perch of land by the decision of the court. This abnegation of his own opinion and implicit deference to the opinions of his forefathers, common to the English and American lawyer, this subjection of thought which he is obliged to profess, necessarily gives him more timid habits and more sluggish inclinations in England and America, than in France."

We can not but remark that, had De Tocqueville been conversant with the courts of Tennessee, he would frequently have encountered



the introduction of a system of ideas altogether peculiar to the counsel employed.

We think that, upon the whole, the certainty of the jurisprudence is to be preferred, which pays due regard to the maxim of "*stare decisis*." But this only exacts conformity with the decisions of one's own State, except where the ultimate decision lies with the Supreme Court of the United States, and conformity here with the decisions of that tribunal. The decisions of other States should be deferred to just in proportion to their intrinsic merits. But they are usually submitted to as authorities by our judges. Now, the best corrective of this disposition to lay too much stress upon mere precedents, which is our *lues legalis*, is a thorough grounding in the principles of the law.

Of course, we do not expect the student, while engaged in his preparation for the Bar, to read absolutely nothing but law. But he had better read nothing calculated to introduce into his mind a different order of ideas. Let him recreate with the constitutional history of England and the political history of his own country. At odd moments he may refresh his logic and metaphysics. The lives of great lawyers will be entertaining and instructive. There are Campbell's lives of the Lord Chancellors and the Chief Justices of England; Kennedy's Life of Wirt; Wheaton's Life of Pinkney; the Life of Chief Justice Parker, by his son; the Life of Rufus Choate; Memorials of the Early Lives and doings of Great Lawyers, by Brightwell; and Jeaffreson's Book about Lawyers. Parker's Reminiscences of Choate; Washburn's Lectures on the Study and Practice of the Law; Sharswood's Legal Ethics; and Ram on Facts, are well worthy of careful perusal.

But every young man who wishes to become a lawyer, can not attend a law school. And many are so circumstanced that they must rely upon whatever calling they embrace for a support, and must hope to make their principal acquisitions after they have begun to practice the calling. What must this class read? We think that we can give them profitable advice. We address ourselves chiefly to those intending to practice in our own State of Tennessee, of course. And we do not propose to imitate those advisers whose principal aim is partly, and perhaps mainly, to gain credit for learning by laying down a vast course of reading, such as they themselves never even dreamed of making. Our design is merely to give to the beginner

the benefit of our knowledge of books and our experience, as to how with the least possible expenditure of time and study he may qualify himself to commence to practice law.

First, then, let him read Walker's American Law. This is one of the best first books ever written upon any subject. Let this be re-read until the student has completely mastered it. And just here let us quote a few words of wisdom from Judge Sharswood: "*Non multa sed multum*, is the cardinal maxim by which the student of law should be governed in his readings at the commencement of his studies. Repetition, repetition, repetition." Let not the student be in a hurry to get over many pages. Remember Lord Eldon's motto: "*Sat cito si sat bene*." And Lord Hale's, which he had graven on the head of his cane: "*Festina lente*." Progress is to be counted, not by pages turned over, but by knowledge transferred to the brain. Having thoroughly mastered Walker, then read, mark and inwardly digest Caruthers's History of a Law-Suit. This is a bible of practice in Tennessee. Then read Kent's Commentaries. Of these, read that part of the first volume which treats of the jurisprudence of the Union, with the utmost care. And read very thoroughly the fourth volume. We know of no substitute for these two volumes of Kent. The first volume contains a masterly compend of the law of nations and the jurisprudence of the Union, and the fourth volume, of the law of real estate. The other two volumes treat of subjects discussed in other books, which will be mentioned. Kent, with all his merits is, it must be confessed, a very arid sort of writer. There is one chapter in the fourth volume where he undertakes to explain the law of attendant terms, which chapter Professor Greene, of the Lebanon Law School, required the writer's class to read, but warned them against the delusion of expecting to understand any of it. We remember that we smiled presumptuously at the idea of our not being able to understand anything written by old Kent in plain English; but we also remember that the next day our notions of attendant terms were not by any means superfluously distinct. Next in order, let the student read Bishop's Criminal Law. The first volume of this work is a remarkable book, written in the true scientific spirit, and abounding in general principles. Next, let him take up Stephens on Pleading, and then Greenleaf on Evidence. First Greenleaf must be so digested that the student will have it at his tongue's end; for this sort of law he must always use off-hand.

Pleading, practice and evidence are very nearly connected. Formerly the technical law of pleading cut a great figure in the equipment of a lawyer. But the case is now very different. All the technicalities have been abolished and unlimited amendments are allowed. It will now suffice for the pleadings at law to state in plain language the ultimate facts which being established sustain the case. These facts in a valid case are merely the summary of the evidence, which consists of the details of fact composing ultimate facts which constitute the case. Practice deals with the steps necessary to bring about the action of the tribunal upon the pleadings and evidence, and those necessary to secure the enforcement of the judgment. Next, let Parsons on Contracts be read. The student may then take up Adams's Equity. This is the best work upon equity jurisprudence to be used as a legal institute. It begins by giving a clear and comprehensive outline of the subject, and then proceeds to take up each separate head,—the philosophical manner of treatment for the student. Some work upon equity pleading should be read next—and we know of none better than Story's—though technical rules of pleading cut very little figure in the administration of equity. We think that it would be a great improvement in the law of remedy to apply the forms of practice in equity or admiralty, with some slight modifications, to every controversy; the plaintiff stating upon oath, in plain English, what grounds of complaint he relies upon, and the defendant in the same manner, stating in reply, the precise grounds of his defence, with leave to the plaintiff to amend, if necessary to meet any allegations of the answer not anticipated; everything not denied to be taken as admitted, and the *probata* confined to the *allegata*: proper references to be had, and the judgment to adjust itself to the nature of the case, with an appeal upon the facts to the court of errors. We would also, abolish the jury, and have law and equity administered by the same tribunals.

Let the student now read Conkling's Treatise, in order to learn the practice of the United States courts, and Story on the Constitution, for constitutional law; and then, after looking through the Code of the state, he may venture to hang out his shingle. If he undertakes to practice in a sea-port town in any state, he should read, in addition to the books above mentioned, Parsons on Maritime Law, and Conkling's Admiralty Practice; and he may occasionally, even in Tennessee, have use for admiralty law. Suits in admiralty are

common, we believe, in the United States district court at Memphis, and we have known of their being brought at Nashville, and indeed we have brought them ourself.

The whole edifice of the law has now been traversed; not minutely, but every apartment has been looked into, and the clew obtained for further researches. But let not our young lawyerling be so absurd as to imagine for a fraction of a moment that he is a lawyer. And we address the same injunction to the law-school graduate. Either has just entered upon the threshold of legal knowledge. For of the substance of what he has read he has incorporated into the texture of his own mind only a small portion. His legal notions are necessarily very general. Yet he has formed the groundwork of a legal mind. He knows enough to raise the points of a reasonably simple law suit; and he knows how to search for fuller knowledge.

Now let our neophyte provide himself with the reports of his own state, and the digest of them. (The altogether admirable edition of a portion of the Tennessee reports, by Judge W. F. Cooper, will, we hope, soon be completed.) He will, of course, procure, as soon as he can, a reasonable complement of standard text-books. And now he should form for himself a plan of study, and adhere to it religiously, for the next several years at least. This is perhaps the turning point of his career. The habits he will form within the first year or two after he comes to the Bar will probably determine whether he is to rise to the top of his profession, or to remain upon the flat plain of mediocrity all his days. We once heard Judge Turney, of our present supreme court, in commending a young lawyer of East Tennessee, lay great stress upon his having started aright. The remark impressed us. It emanated from an insight into the great importance of what we are endeavoring to emphasize.

It is natural for a young lawyer to desire to obtain as much business as possible. But the worst misfortune which could befall him professionally would be to obtain so much of the class of business which is likely to be bestowed upon young lawyers as to have no time for study and reflection. Once let him become immersed in this sort of business, and lose the habit of study, and the chances are heavily against his rising in his profession. A youthful epistle of Daniel Webster occurs to us in this connection. "Study," writes he, to his friend Bingham, "is the grand requisite for a lawyer. Men may be born poets and leap from their cradles painters; nature may

have made them musicians and called on them only to exercise and not to acquire ability; but law is artificial. It is a human science to be learned, not inspired. Let there be a genius for whom nature has done so much as apparently to have left nothing for application, yet to make a lawyer application must do as much as if Nature had done nothing. The evil is that an accursed thirst for money violates everything. We can not study because we must petifog. We learn the low recourses of attorneyism when we should learn the conceptions, and the reasonings, and the opinions of Cicero and Murray."

Mr. Curtis inform us, in his biography, that the writer of these lines, during the outset of his professional life, with energy continued "to resist the influence of that kind of practice in which most young men must begin their professional life," and labored "to make himself a real lawyer."

As to what should be now read, our advice is first of all the reports of the practitioner's own state, straight through. By achieving some fifty pages of solid reading daily, the entire series of Tennessee reports may be dispatched in no very great while. For the briefs of counsel may be passed over, and cases where the controversy was merely of fact may be gone over rapidly; and those where leading cases are merely referred to and reaffirmed may be simply recognized. But where conclusions are reasoned out and new points settled, or authorities carefully reviewed, these decisions should, in the language of Lord Bacon, be "thoroughly chewed and digested."

Senator Carpenter, in a recent lecture to the law-graduates of Columbia College, advised the selection of some great judge whose opinions should be thoroughly studied, and the mind of the student formed upon them as far as possible, designating Chief Justice Marshall as his preference. We would add, the opinions of Chancellor Kent, in Johnson's Chancery Reports; those of Chief Justice Ambrose Spencer, of New York; and those of Judge Gaston of North Carolina. Chief Justice Parsons, of Massachusetts, and Chief Justice Gibson of Pennsylvania, are also among the most distinguished of our jurists.

We would advise the young lawyer, at some time or other, to read Blackstone. We do not think that much benefit is now to be derived from this author; but he enjoys the reputation of a legal classic, and the Commentaries are easy reading, and they are written in a pleasant, flowing style. Formerly, every law student had to mas-

ter Blackstone as a first book. We make bold to say that Walker's American Law is an infinitely preferable one now. It used to be the fashion to go into ecstasies over Blackstone. Of late he has come in for his share of dispraise and disparagement. The learned Mr. Austin, in his "Jurisprudence," uses the following language respecting him: "The method observed by Blackstone in his far too-celebrated Commentaries, is a slavish and blundering copy of the very imperfect method which Hall delineates roughly in his short and unfinished Analysis. From the outset to the end of his Commentaries, he blindly adopts the mistakes of his rude and compendious model, missing invariably, with a nice and surprising infelicity, the pregnant but obscure suggestions which it proffered to his attention, and which would have guided a discerning and attentive writer to an arrangement comparatively just. Neither is the general conception nor in the detail of his book is there a single particle of original and discriminating thought. He had read somewhat, though far less than is commonly believed; but he had swallowed the matter of his reading, without choice and without rumination. He owed the popularity of his book to a paltry but effectual artifice, and to a poor superficial merit. He truckled to the sinister interests and to the mischievous prejudices of power; and he flattered the overweening conceit of their national or peculiar institutions which was then devoutly entertained by the body of the English people, though now it is happily vanishing before the advancement of reason. And to this paltry but effectual artifice he added the allurements of a style which is fitted to tickle the ear, though it never, or rarely, satisfies a severe and masculine taste. For that rhetorical and prattling manner of his is not the manner which suited the matter in hand. It is not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected yet apt and nervous style, as the tawdry and flimsy dress of a milliner's doll from the graceful and imposing nakedness of a Grecian statue." We must frankly confess that we take pleasure in every kick which Professor Austin bestows upon his countryman, the old humbug of the Commentaries, with his sentimental, rose-colored puffs of English law. He always did turn our stomach. Yet, as we have remarked, he is generally regarded as a legal luminary, and we would advise the student to read him. As to Coke, nobody would now think of puzzling with him. Most of the law to



be there found has little application now in any of the United States. Lord Mansfield entertained a contemptuous opinion of the old fellow, with his crotchets and quaint conceits. Mr. Pinkney used to say that himself and Chief Justice Parsons of Massachusetts were the only two men in America who had mastered Coke Lyttleton; which, if true, or if even probable, would seem to show that the feat was one more remarkable than necessary or useful. The student should become familiar with those at least of the decisions of the Supreme Court of the United States which involve questions of national jurisprudence, in which the lawyers of every State are equally interested.

But it requires more than law knowledge to make a successful lawyer: and this requisite addition is not to be found in any book extant with which we are acquainted. This is, we have often thought, somewhat to be wondered at. For while in some things dexterity can only be acquired by practice, yet it can not be doubted that a great deal of the experience of an old practitioner of law might be by him imparted to the docile and intelligent neophyte; and, of course, this might be done through the medium of a well-written book. It is a great mistake to suppose that what is termed "*practical*" knowledge can not be conveyed, like other knowledge, by means of a book. Hear one of the most commonsensical, as well as one of the greatest of human intellects,—“broad-browed Verulam, the first of them that know,”—upon this subject:

“The wisdom touching negotiation or business hath not hitherto been collected into writing, to the great derogation of learning and the profession of learning \* \* \* \* For the wisdom of business wherein man’s life is most conversant, there be no books of it, except some few scattered advertisements that have no proportion to the magnitude of this subject. For if books were written of this, as of the other, I doubt not but learned men, with mean experience, would far excel men of long experience without learning, and out-shoot them with their own bow.”

We will only venture upon a few suggestions to the young lawyerling raw and green, and those of a very plain character. And first, we say, be systematic in your business. Procure a claim-book, a letter-book, an adhesive file for letters received, a copying-press, a bank-book, a check-book and a receipt book. Immediately upon receiving a claim for suit, receipt for it, and then enter it in your

claim-book in full. Copy every letter you write of any sort of importance, especially letters remitting money and making explanations. File immediately in your adhesive file every letter received. Keep these three books well indexed. Remit money *immediately* upon collection. It is well to make all your payments of money to home clients by checks to their order, retaining memoranda on the stubs of the check-book. If the receipts should then be mislaid, the checks indorsed by them will answer as receipts. Take receipts in your receipt-book. When necessary, tear off the blank form from the receipt-book to send away, and when it has been filled up and signed and returned, paste it neatly back upon the stub with mucilage.

These may seem like small matters; so they are unless you neglect them. Answer business letters promptly. Don't go security for costs for your clients, except where absolutely necessary. Before you bring a suit, obtain a clear idea of what points must be established to maintain it, and by what evidence you are to establish them. Draw your declaration, when you bring the suit, while the case is fresh in your mind, and file it when your writ is issued. Set out the facts in the declaration, unless for some reason this would be impolitic, at length; so that by hearing it read the jury will see what your case is, and generally add the common counts. When defending, plead the general issue in addition to whatever special matter of defense you may have. Don't talk about your law-suits, so as to show your hand. Do all you can honorably to ascertain upon what the other side relies. If possible, always confer with your witnesses before the trial. In important cases take down their testimony before hand. Then eliminate what is irrelevant, and frame written questions covering what is material. Then, if possible, see the witnesses again, and read your questions to them, and see that they understand how much of what they know to deliver in reply to each question. The object of this is that the witnesses when on the stand may answer with readiness, and responsively to the questions asked, without hesitation or stammering, but positively and clearly. Thus their testimony will tell to the best advantage. And having your questions carefully written, you will be sure in your examination to cover the whole field of inquiry. And you will feel confident that you are prepared. Bring out your evidence in the proper order, so that the drift of it will be easily comprehended by the jury. It is often advantageous to begin your case by stating



what you propose to prove. This will properly direct the attention of the jury. The court will always allow you to do this. The English practice is for the plaintiff's counsel to unfold his case in a speech fully setting forth what he proposes to prove, and for him then to produce his evidence, after which the defendant's counsel in his reply sets out what he proposes to prove, and then produces his evidence, when the plaintiff's counsel produces his rebutting evidence, and concludes. Sometimes after hearing the plaintiff's evidence in chief, the counsel for the defense would regard it as insufficient even if true, and would demur to the evidence. Whereupon this evidence would be taken down, and then its sufficiency became a question for the court, and the case was withdrawn from the jury. We suppose that one object of this course, when taken, is to withdraw from the jury cases in which the defendant fears lest their prejudices might lead them to supply the gaps in the plaintiff's proof. Theoretically, the practice of demurring to evidence is known to the law of Tennessee, but we question whether the oldest lawyer ever knew of a case of its being done.

If you have a witness so unprepossessing that to look at him would prejudice the jury against him; or one so timid that his hesitating, confused, drawling answers would make little impression, or a bad impression, on the jury; or an absurd one who, excited by the presence of the jury, and the lawyers, and the spectators in the court room, would behave foolishly, and impair his testimony thereby; or one who is slow and unable to stand the fire of a cross-examination; in these cases, and in others which will readily occur to the practitioner, take the witness's deposition, and don't produce him bodily in court. If the matter of the testimony goes down properly into the deposition, you get it before the jury in as good a shape as if the witness had been a model one. In the quiet of your office where you may take the deposition, almost any witness will be at ease and master of his faculties, and the opposite counsel will lack the stimulus of the "*gaudeamus certaminis*" in his onslaught upon him. You can, moreover, surround the witness with friends, whose presence will reassure him as he deposes. But when the witness possesses the proper traits, his testimony will be more effectual if given in person than if read from a deposition.

As to cross-examination, it is here that the tyro will be most apt to bungle. The principal use of cross-examination, so far as our

experience goes, is to analyze the general statements made by a witness, and to show that they are founded upon insufficient data. Most men mix up fact and inference; and thus often a witness will make a statement which is in form the statement of a fact, but in reality involves a good deal of mere inference or opinion. Here, drawing out in minute detail the real basis of the statement is frequently like pricking a bubble. When the grounds of the statement appear, the testimony is seen to amount to nothing. Often you may show the character of the witness by cross-examination; or you may bring out some fact, such as a grudge against a party to the suit, or intimate relations with the other party, which serves to modify the credence given to the witness by the jury. It is seldom, however, that a witness of average intelligence can be made to unsay what he has once said. And if he has told the truth, by cross-examination you only make him repeat the story, and frequently he does this with greater distinctness, or even brings out a new fact; and so your cross-examination has hurt you. If the witness has not injured your case, it is always best to let him alone. Cross-examination in the hands of a raw practitioner rarely yields any valuable fruits. And often, *very* often, it injures his case. He should therefore sparingly indulge in this luxury. Lord Eldon used to say that he had been a most efficient advocate for prisoners, for that he had never put a question to a prosecutor; meaning that it was wise not to cross-examine the prosecutor, inasmuch as it would only lead to his repeating his statement, and deepening the impression upon the jury. O'Connell was also extremely cautious in cross-examining the witnesses against his client. Curran, in his sketch of the Irish bar, says: "He presses a witness upon collateral facts, and beats him down by argument and jokes and vociferation; but wisely presuming his client to be guilty until he has the good luck to escape conviction, he never affords the witness an opportunity of repeating his original narrative, and perhaps, by supplying an omitted item, of sealing the doom of the accused." It is certainly a safe rule never to cross-examine except to gain some distinct object. Professor Washburn, in a little work upon the practice of the law, quotes approvingly from the address of Mr. Carpenter, already alluded to, as follows:

"I believe that more causes are lost by unskillful examination of witnesses than from all other species of malpractice combined. Always know what your witness is called to prove; direct his mind to

that particular object; get through with him as quickly as possible. In cross-examination of witnesses, if I were to lay down one and an invariable rule, it would be not to cross-examine at all. In nine cases out of ten, where a witness testifies against you, your cross-examination will make a bad matter worse."

Don't make merely captious objections to the questions propounded by the adverse counsel to witnesses.

The practitioner, as heretofore intimated, should have the law of evidence at his tongue's very tip, as he has to act upon his knowledge of it off-hand. It is a great point always to remain calm and cool, with one's faculties clear and on the alert. An anecdote may serve to illustrate this. It is thus related by Judge Sharswood:

"There was a gentleman of the Bar of Philadelphia many years ago, who possessed these qualities—**equanimity and self-possession**—in a very remarkable degree. He allowed nothing that occurred in a cause to disturb or surprise him. On one occasion, in one of the neighboring counties, the circuit of which it was his custom to ride, he was trying a cause on a bond, when a witness for the defendant was introduced, who testified that the defendant had taken the amount of the bond, which was quite a large sum, from his residence to that of the obligee, a distance of several miles, and paid him in silver in his presence. The evidence was totally unexpected; his clients were orphan children; all their fortune was staked on this case. The witness had not yet committed himself as to how the money was carried. Without any discomposure,—without lifting his eyes or pen from paper,—he made on the margin of his notes of trial a calculation of what that amount in silver would weigh; and when it came to his turn to cross-examine, calmly proceeded to make the witness repeat his testimony. Step by step,—when, where, how, and how far the money was carried,—and then asked him if he knew how much that sum of money weighed; and upon naming the amount, so confounded the witness, party, and counsel engaged for the defendant, that the defence was at once abandoned, and a verdict for the plaintiff rendered on the spot."

As to the speaking part of a lawyer's work, his whole aim should be to impress his view of the case strongly upon the court and jury. He should eschew display. Mere declamation should be sparingly indulged in. The case should be set forth in the simplest possible language, and in the plainest manner.. A colloquial, off-hand style:

is usually the best for the jury. The finest model of style, to our taste, for a speaker, is Daniel Webster's speeches. Webster once sent one of his speeches to Davy Crockett. Meeting him afterwards Crockett praised the speech very highly, and said that when he sat down to its perusal he thought that he should find it full of dictionary words, and so provided himself with a dictionary, but that he had not found a single dictionary word in it. Mr. Webster remarked that this was one of the highest compliments ever paid to his style. Rufus Choate delighted in "long-tailed words in ation and osity;" but his genius enabled him to charm and to conquer in spite of his vicious style. John Marshall, while at the Bar, was one of the mightiest of advocates. He utterly disdained everything like ornament. Mr. Wirt thus describes him:

"This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world, if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intended \* \* \* His voice is dry and hard; his attitude in his most effective orations was often extremely awkward; as it was not unusual for him to stand with his left foot in advance, while all his gesture proceeded from his right arm, and consisted merely in a vehement perpendicular swing of it from about the elevation of his head to the bar behind which he stood. As to fancy, if she hold a seat in his mind at all, which I very much doubt, his gigantic genius tramples with disdain on all her flower—decked plats, and blooming parterres. How then, you will ask, with incredulous curiosity, is it possible that such a man can hold the attention of an audience enchained through a speech of even ordinary length? I will tell you. He possesses one original and almost supernatural faculty; the faculty of developing a subject by a single glance of his mind, and detecting at once the very point on which every controversy depends. No matter what the question, though ten times more knotty than the gnarled oak, the lightning of heaven is not more rapid nor more resistless than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take in its various objects with more

promptitude and facility than his mind embraces and analyzes the most complex subject. Possessing at the bar this intellectual elevation, which enables him to look down and comprehend the whole ground at once, he determined immediately, and without difficulty, on which side the question might be most advantageously approached and assailed. In a bad cause his art consisted in laying his premises so remotely from the point directly in debate, or else in terms so specious, that the hearer, seeing no consequences which could be drawn from them, was just as willing to admit them as not; but his premises once admitted, the demonstration, however distant, followed as certainly, as cogently, as inevitably, as any demonstration in Euclid. All his eloquence consists in the apparently deep self-conviction and emphatic earnestness of his manner; the correspondent simplicity and energy of his style; the close and logical connection of his thoughts; and the easy gradations by which he opens his lights on the attentive minds of his hearers. The audience are never permitted to pause for a moment. There is no stopping to weave garlands of flowers to hang in festoons around a favorite argument. On the contrary, every sentence is progressive; every idea sheds new light on the subject; the listener is kept perpetually in that sweetly pleasurable vibration with which the mind of man always receives new truths; the dawn advances in easy but unremitting pace; the subject opens gradually on the view; until rising in high relief, in all its native colors and proportions the argument is consummated by the conviction of the delighted hearer."

Chief Justice Parsons, of Massachusetts, one of the very largest of the giants of the law, used to say that eloquence was a hinderance to a lawyer; meaning, of course, by eloquence, seductive fluency of speech and copiousness of rhetorical figures. Chief Justice Isaac Parker used to tell a good story illustrating Parsons's manner of speaking, which we copy from the biography of the latter by his son Professor Parsons: "Parker was living in Maine, and either a student or very young in the profession. My father, then also a young man, had been sent for in some important case. He was quite unknown to all persons outside the bar, and not well known even to the lawyers. When his turn came to argue the case, he put one foot in his chair, and, with an elbow on his knee, leaned over and began to talk about the case as a man might talk to his neighbor by his fireside. Pretty soon, said Parker, I thought I understood him. He was winding

that jury round his fingers. He made no show; he treated the case as if it were a simple affair of which the conclusion was obvious and inevitable, and he did not talk long. He got a verdict at once, and after the jury were dismissed, one of them whom I happened to know, came to me and said: 'Who is this Mr. Parsons? He is not much of a lawyer, and don't talk or look as if he ever would be one; but he seems to be a real good sort of a man.'" Parsons here displayed the highest degree of art. "*Artis est celare artem.*" We are reminded here of Prior's lines descriptive of a coquette:

"Artless she is with artful care,  
Affecting to be unaffected."

Whately divides orators into sun-light orators and moonlight orators. The former fill the minds of the audience with their theme; the latter with themselves. Thus we never say, look at the beautiful sun-light. We admire the landscape which the sunlight reveals; but we think about the beauty of the moon-light itself. Parsons in the anecdote just related furnishes an excellent illustration of the former sort of speakers. Patrick Henry belonged to the sunlight, and Richard Henry Lee to the moon-light species. In France, Guizot belonged to the former, and Thiers to the latter category. Mr. Webster and Mr. Wirt also illustrate the respective kinds of orators. Edward Everett was a moon-light orator. Professor Parsons says of his father's manner: "It was said to have been easy and familiar to the last degree. There was no studied beginning nor ending, nothing of the manner or the tricks or the graces of the orator, and no approach to them. His business was to persuade those twelve men of the truth of certain propositions; and he did his work in the most direct, the plainest, and the simplest way. There was an actual, and, I rather think, a studied, absence of all appearance of eloquence, and even of technical logic."

One thing we do earnestly insist upon. Always take care to make a clear, full statement of your case. Almost all the lawyers we have ever known have been deficient here. This was one of the excellences of Mr. Webster. We have somewhere read that at the commencement of his career, he once appeared in a case called late in the day, when the judge was fatigued and anxious to adjourn. Mr. Webster said that he only desired to make a brief statement of the case, which he proceeded to do. The Judge, after hearing him, said to an old law-



yer standing by the bench: "That young man's statement is an unanswerable argument."

We think that in an opening speech great pains should be taken to set forth the whole merits of the case. First impressions are lasting. The closing speech is an advantage, but so also is the opening. It is a great mistake to make the opening in a mere *pro forma* style, calculating to reserve one's thunder for the conclusion. And this principle applies to the speech itself, namely, that in the early part of the speech care should be taken to impress the jury with the case. We copy the following from the conversations of Rufus Choate. "A speaker makes his impression, if he ever makes it, in the first hour, sometimes in the first fifteen minutes; for, if he has a proper and firm grasp of his case, he then puts forth the outline of his grounds of argument. He plays the overture, which hints at or announces all the airs of the coming opera. All the rest is the mere filling up, answering objections, giving one jurymen little arguments with which to answer the objections of his fellows, etc."

Mr. Choate thought that about an hour was the limit of an audience's capacity of attention. "The jury address of four hours," said he, "is no exception to this; for they don't in its whole course give more than one hour's fixed attention. Some parts of that hour's attention may be scattered over various portions of the argument, but generally the most of it is given at first. Then curiosity for what you're going to rely upon in argument is all aroused and they are eager and attentive. After that they wander, and always in my long addresses to juries, *some one goes to sleep.*"

Such remarks as that of Parsons about eloquence are, however, apt to mislead. There is an art of rhetoric having for its object the most effective presentation of the matter of the speaker,—the best mode of impressing the minds of those whom it is desired to influence. Eloquence, rightly understood, is persuasive speech. An apt arrangement of one's thoughts and arguments and a felicitous selection of illustrations, are matters worthy of careful consideration. A well told story—a well put argument, are more telling than the same story badly told—the same argument badly put. The speaker is to consider his audience and adapt his harangue to them so as to strike their minds in the most forcible possible manner. Sometimes he will be most effective by the most rustic plainness, even savoring of coarseness. In that case, a coarse plainness is eloquence. No man



was more severely plain of speech than Daniel Webster. But he had been a very careful student of the art of speaking effectively. Mr. Choate tells us that, from conversations with him, he ascertained that he had carefully considered that part of rhetoric appertaining to the proper arrangement and distribution of proofs. "I recall," adds Mr. Choate, "his speaking to me at another time of the propriety of placing the weaker arguments in the middle of the speech."

There is *a best way* of doing everything capable of being done at all. You have certain arguments to present to a jury, and you desire to play upon certain feelings, predilections, or prejudices of theirs. These things are susceptible of being done with different degrees of effectiveness. Rhetoric is merely the art of doing them in the most effective manner.

Mr. Choate cautions the speaker against falling into the error, in addressing an audience, of looking about from side to side in the middle of his sentences, so that in fact he addresses nobody in particular. "It is well enough," he says, "to address different quarters or sections of the audience. But if you were conversing with a circle of friends, you wouldn't look around naturally, save at conclusions of sentences, or at least clauses of sentences."

A young beginner may hardly aspire to a high degree of rhetorical efficiency. But he must not be content with anything less than bringing out somehow his whole case as he understands it. To this end, it is absolutely necessary that he thoroughly digest his matter and divide his speech into heads, carrying out each head into proper subdivisions; and that he carry the map of these divisions and subdivisions in his mind's eye all throughout. In this division of his matter, his logical training will stand him in good stead. Let him not omit to go over in his preparation every step of the path to be traversed in the speech. Let him elaborate everything thoroughly. Of course, he will aim to deliver what has been thus carefully concocted in an easy, off-hand style, as if it had just occurred to him during the trial. The young lawyer has doubtless listened to just such speeches from veterans, whose readiness has excited his admiration. Let him not be imposed upon. There never was a truer saying than this: "*Nulla excellentia sine magno labore.*" Mr. Choate urged the pre-writing of speeches. Mr. Parker tells us that "he subscribed to Lord Brougham's theory that vagueness and looseness and weakness

of matter can only be prevented by the speaker's careful, previous-written composition."

Great speakers who have dealt in argumentation have generally insisted upon the necessity of written preparation. Not writing with a view of committing the composition to memory, however, of course. "There is," said Mr. Choate, "an anecdote of Hamilton, illustrating what I have said of the value of writing as a preparative in respect to full and deep thought. Hamilton made the greatest argument ever uttered in this country. It was on the law of libel, and by it he stamped upon the mind of this country the principle that in an action for libel the truth, if uttered without malice, was a justification. Upon the night previous to the argument he wrote out every word of it. Then he tore it up. He was by writing fully prepared. It lay very fully in his mind; and not to be cramped and fettered by a verbal exactness, he tore it to pieces. Then he spoke and conquered." The truth is, that nearly all the good things even that are gotten off apparently *impromptu*, have been carefully fabricated and laid by for future use. Hudibras is one of the wittiest books ever written. Here is the explanation of it. "The author of Hudibras," said Dr. Johnson, "had a common-place book in which he had repositied not such events or precepts as are gathered by reading, but such remarks, similitudes, allusions, assemblages or inferences as occasion prompted or inclination produced; these thoughts which were generated in his own mind, and might be usefully applied to some future purpose."

One of the most powerful and wonderful speeches ever delivered was that of Sheridan on the impeachment of Warren Hastings. Mr. Pitt said of it: "All parties were under the wand of the enchanter, and only vied with each other in describing the fascination under which they were held." Mr. Windham, even twenty years after, said the speech deserved all its fame as the finest in the memory of man. Mr. Fox, also, in answer to a question of Lord Holland's, specified Sheridan's on the Oude charge as the finest speech of his day. This would seem like genius,—like inspiration; but if genius means, as in the common acceptation it does mean, a power that attains its end by means wholly new and unpracticed by others, then was Sheridan's speech no work of genius. Moore describes him at the desk, like other men, writing and erasing. "Mr. Speaker," to

fill up this pause, and "Sir;" to fill up that. Sheridan stored up wit like Butler. Some of his famous witticisms were found in his desk written in many different forms,—the point shifted, to try the effect, from one part of the sentence to another. Thus did he laboriously mould and manufacture what he had the readiness to utter as an *impromptu*.

Sometimes a great *extempore* speech, so called, is made. But here the matter lay already digested in the speaker's mind, as the result of previous study and elaboration; and making the speech was like putting up a portable house, of which the parts were already made and fitted to correspond with each other. And even then the speaker exhibited an intellectual dexterity, the result of a long and severe training. "How long were you painting that arm?" asked a young artist of Leonardo Da Vinci. "Twenty years," replied he. He had been employed upon it only a week; but he meant that the ability to do that week's work was the result of twenty years' practice. Take the matter of a copious command of language. William Pitt was famous for his ability to pour out, at a moment's notice, a torrent of flowing, well-rounded periods. Macaulay tells us that he acquired this facility by translating aloud every day for years, to his tutor at the University, from some Greek author, whose meaning he aimed to render into the best and most sonorous English. Wedderburn used to translate over and over again Pascal's Provincial Letters. Choate insisted upon the importance of "daily translation, pen in hand—most accurately sifting words and comparing synonyms." Mr. Pinkney was a great student of words. He had all the dictionaries he could buy, from Richardson to Webster. Of Erskine, Choate said: "He had thrown himself upon the best English literature with a voracious appetite, and from it, especially from his careful study of Milton and Shakespeare, he gained his chaste, rich and admirable diction." Numerous other instances might be given; but enough has been said, we hope, to impress the conviction that everything admirable has to be labored, and that this is true even as to the most gifted minds. The young lawyer will therefore understand that *he* must put forth all *his* energy, and rely upon the most thorough elaboration, in order to be even respectable. Let him carefully go over in his mind again and again everything he is going to say; and, as already urged, let him carry the diagram of his argument clearly mapped out in his mind's eye.

One other item of advice. Let him whenever he has a case take some first-rate text-book and also the digest of reports and look over the heading embracing the law involved, even if he regards this as plain and simple. Also, let him glance into the Code to see if there is not some statutory provision there relating to the case. The memory is so treacherous, and there are so many limitations and qualifications and distinctions in the law, that there is no security except in this practice. How often in our casual reading have we stumbled upon some deeply important law bearing upon cases which had been in our hands for a long time, and which we fondly imagined we had mastered; and thus, at the very eleventh hour, and that too accidentally, been guided to our strongest positions in the cases.

Always endeavor to reach the very bottom of every principle investigated, and always carefully preserve your briefs. After a while you will have stored up a very army of authorities, upon a large proportion of the questions apt to arise in your practice. Then in a single night you will be able to put together an argument which otherwise would occupy you perhaps a month.

We know a lawyer at the Nashville bar who investigates every case exhaustively with the aid of the United States Digest, all of the forty odd volumes of which he has. In his investigation he takes memoranda of the cases *pro* as well as *contra*; as he finds, of course, both sorts. He carefully files away the results of his researches. And he now has, all nicely stored up, a perfect armory of legal propositions with the authorities sustaining them. He could hardly be employed in a case in which, in a single night, he could not construct an argument from some of his prepared material which would fairly astound any one not in the secret of its composition. There may be five cases on his side of a question and twenty on the opposite side. Probably, however, he has a lazy opponent who does not find more than one or two of these. In the morning our friend will come up with his five cases, which he will produce with such an air as to make the impression that in a short search he has lighted upon these, and that if he had had more time he might have found any required number of others, and the court will be apt to think the current of authority all that way; whereas those five cases are all that could be found on that side after the most patient and comprehensive research.

We remember an anecdote of Mr. Webster, told by himself, illus-

trating the value of deep research, even in cases unimportant as to amount. He said that a year or two after he commenced practice in New Hampshire, he was consulted by a blacksmith in a case involving about forty dollars. It was one of the very knottiest of cases, however, presenting some very nice and abstruse questions touching the law of executive devises, springing uses, cross-remainders, etc.,—lying among the craggiest steeps of real estate jurisprudence. The blacksmith desired to know whether he could recover, and if so to have suit brought. Mr. Webster became interested in the case, and not being overwhelmed with business just then, he determined to master it. In order to do so, he had to send to Boston for several rather uncommon books, costing more than the amount of money involved in the case. After devoting some three weeks hard study to the legal questions he came to the conclusion that his client was entitled to recover, and so advised him. The suit was brought and successfully prosecuted. Years afterwards Mr. Webster, then in the zenith of his fame as a lawyer, was in New York, when Aaron Burr called to consult him in a very large and important case which he was employed to conduct. Mr. Webster listened to him for a while, and then he saw that it was his blacksmith's very case over again,—the very identical case which formerly he had mastered so thoroughly. The moment Burr had ceased to talk he commenced,—Mr. Webster never forgot anything—and poured upon all the points of the case a stream of the profoundest and most abstruse learning, abounding in the nicest distinctions,—citing accurately all the authorities. Burr stared at him in amazement, and could hardly be convinced that Mr. Webster had not been conferred with by the other side. For his suspicions as to this Mr. Webster said he made him pay handsomely when the fee came to be divided.

We remember an anecdote of Chief Justice Parsons, while at the bar, which illustrates the importance of filing away the results of research. Mr. Parsons had been retained by the State of Connecticut to argue a case before Chief Justice Ellsworth against Alexander Hamilton, who was employed by the State of New York. After the trial, both gentlemen dined at Mr. Wadsworth's, who had invited the leading members of the bar then in Hartford. At dinner Hamilton said: "Mr. Parsons, let me ask you one thing. The point I made (describing it) was suggested to me only after much study of the case, and then almost by accident, but I thought it very

strong. You were fully prepared for it, and gathered and exhibited the authorities at once, and prevailed, and I must submit; but I was a good deal surprised at it; and what I want to know is, whether you had anticipated that point." "Not in the least," was the answer; "but so long ago as when I was studying with Judge Trowbridge, the question was suggested to me, and I made a brief of the authorities, which I happened to have brought here with me, and I found the books in Judge Ellsworth's library." We copy another anecdote, in the same connection, from the life of Parsons. "While I was studying in Byfield, Judge Trowbridge (his preceptor) said to me that he thought the practice of the English common law courts in requiring proof of a will devising real estate whenever it was to be used in those courts in support of title, should not be held as applicable here; because from the nature and practice of our courts of probate, and their relation to other courts, the original proof in probate ought to be sufficient and conclusive; and if the will were subsequently wanted as evidence in another court, a mere record of the judgment and decree in probate should be enough, and indeed all that could be there received; because those inquiries which precede probate, belong here exclusively to a court of probate. Accordingly I examined this question and made my brief, and filed it away. Almost the first case I had in Court presented this question. I was only the junior counsel, and my senior was one of the leading lawyers of the day. We needed to use a will which had received probate; but the witnesses by whom we could prove it anew in the English fashion were unexpectedly absent. I suggested to my senior that this new proof was unnecessary. Nonsense, said he. I shall make no such point as that. May I, then, said I. Yes; but on your own responsibility. I made the point. The court said the practice was uniformly against me here, as well as in England; they had no doubt about it; but if I wished to be heard in support of my new views, they would hear me. Whereupon, I argued from my brief, and just as well as if I had had a month of preparation. I satisfied the court, succeeded in my point, and gained a most undeserved reputation for *marvelous readiness* and universal knowledge. And I found the effect of this in the immediate increase of my business."

A matter of some importance to the lawyer; and especially to the young lawyer, is the fee to result from the case. In the quaint



phraseology of Coke, the execution is said to be the life of the law. Without any quaintness whatever, the fee may be averred to be the life of the lawyer. And he ought not to do himself the injustice of charging too small a one. To this matter especially, is Judge Turney's idea of the importance of starting aright applicable. Many good lawyers undervalue their services. And many are careless about exacting payment even of what they charge. We know one of the very greatest of the lawyers of Tennessee, until he left the State, who, after a long and distinguished career, which should have yielded him a fortune, found himself just about square with the world. We know of two of the very ablest members of the bar of one of the principal cities of our State, who have each made just about one-tenth of what they should have made. It is difficult to lay down rules of charging in the abstract. Reference must be had to the character of the case, the amount involved, the skill required and exerted, the labor performed, and the result achieved. In a slander suit, where there has been a fat recovery, a large proportion of this should ordinarily gladden the lawyer's pocket; for the recovery is usually just so much clear gain, chiefly earned by the lawyer, to whom the maligned client has only furnished a base of operations. Similarly, in a suit for breach of promise of marriage.

Judge Busteed, of the United States Courts of Alabama, tells of a breach of promise case successfully managed by himself in New York City, which illustrates this matter. His client was, he said, the ugliest woman he ever saw, and had long since passed the line at which the age of females becomes stationary. He told her, for heaven's sake to stay away from the court-house. He took her testimony in the shape of a deposition. When the evidence was concluded, he made a most moving speech to the jury, painting in tones of the tenderest pathos, the tale of injured and heart-broken beauty. He described his client in the most highly wrought, engaging terms, and grew impassioned over her wrongs and deep distress, until, as if overpowered by his emotion, he sank into his seat and wept aloud. The jury returned a verdict for \$7,500. "I divided with her," said the Judge. Now, in such a case, the lawyer stands in about the same relation to the client as a fairy would to one who had furnished merely the dross and refuse which she had turned into gold. Which should have the greater share?

But where the facts need merely to be set forth, and the case then



gains itself; and, moreover, where it is a simple matter to elicit the facts, there the fee should be moderate.

It must be remembered that the lawyer has acquired his skill after a tedious course of study, involving a considerable outlay for books and tuition, and during which he was withdrawn from gainful pursuits, and that he must charge with some reference to reimbursement for this time and expenditure.

It sometimes happens that the client entertains a larger notion of the value of the lawyer's services than the lawyer himself. We know of a ludicrous instance of this kind. During the war, a steamboat loaded with cotton was seized at Memphis. A young lawyer there was applied to by the owner of the cotton, which was of very great value then, to get the boat discharged. He succeeded in doing so. He charged upon his book for this service, a fee of \$250. But after reflecting upon the amount involved, and the value of the service to the owner of the cotton, he ventured to raise the charge to \$500. The next afternoon, his client came hurriedly into his office with his hand full of five hundred dollar bills, to settle the fee. "I haven't got but half an hour ashore," said he, "and I've a dozen things to do, and no time to lose. Let me pay you your fee, and be off. How much is it?" "Ahem," coughed the lawyer, lacking the nerve to mention the sum. "Well, I have been thinking what I ought to charge, and I—I think, under all the circumstances, considering the amount,——" "My dear Sir," interrupted the other, "I am in a fierce hurry, and have't time to hear you talk; tell me what you charge; I don't question your fee." "Well," said the other, speaking very deliberately and hesitatingly, "I have consulted several of my brother lawyers, and,——" "O, Jerusalem," broke in the client, "Here," counting down rapidly four five hundred dollar bills, "will that do?" The lawyer dissembled his astonishment at such behavior, and seeing how easily his client bled, he said with affected nonchalance: "Well, I reckon you'd better add another," which the client instantly did, and bidding him a hasty good-bye, left the room in full tilt.

The sum of our advice is that a proper fee be always charged, and where the client can pay, collected. But charge it anyhow. You can then compromise with a poorer client for less. But let him see that he is indebted to you for remitting the balance. And it is a

good rule to collect, or at least to take a note while the memory of the service rendered is fresh; otherwise the client is apt to furnish an illustration of the maxim, "The storm past, and God forgotten." A lawyer not only loses money, but actually sinks in the estimation of his clients by undervaluing his own services. It used to be said of the New York lawyers, that they worked hard, lived well, and died poor. This is the history of too many of the members of the Bar. The lawyer is a failure who doesn't earn a modest competence at his profession.

The question has often been mooted whether a lawyer is justifiable in advocating knowingly the wrong side of a case. The popular notion seems to be that, as one of the litigants is always wrong, therefore, in every case, the lawyer upon one side, is doing an unjustifiable thing—trying to gain an unjust verdict. On the other hand, Lord Brougham indulges in the following extravagance: "An advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among others to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction, he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion." Lord Brougham was defending Queen Caroline when he got off this stuff—a duty not calculated to recommend him in the future for preferment to the King; and we imagine that his motive for advancing so extreme a theory was to palliate, in the eyes of the King, the vehemence of his advocacy against the King, by making it appear that he felt himself compelled thereto by his conceptions of an advocate's duty.

It is not true that an advocate must know only his client. "The lawyer," says Judge Sharswood, "is not merely the agent of the party: he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and have every view presented to the mind of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error in deciding it in his favor. The court and jury ought certainly to

hear and weigh both sides; and the office of the counsel is to assist them in doing that which the client in person, from want of learning, experience and address, is unable to do in a proper manner. The lawyer who refuses his professional assistance, because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury." This is the good sense of the matter. We think it can be placed in a fuller light, however. Suppose that there were no lawyers, and that the judge had to hear both sides, and examine all the testimony, and look up the law for himself; by what mental process must he arrive at a conclusion? Why, obviously, by first looking at the case from the plaintiff's point of view, and then from the defendant's, and then balancing the considerations *pro* and *contra*. In other words, by himself playing the advocate of both sides successively, and then acting as the judge between them. Suppose, now, that two ingenious friends should, in order to lessen his labors, place themselves upon opposite sides of the case, and each urge everything bearing in favor of his side. Assuredly, this *would* be of the greatest assistance. Now this is just the work done for him by the lawyers of the parties litigant. As for the jury, it is almost impossible to imagine how they would ever get along with a case of disputed facts without the help of the lawyers.

Justice must be administered according to some system. The very best, and indeed the only practicable system, is to constitute a competent and impartial tribunal, and then to have both sides of every case zealously advocated before it. A part of the necessary machinery of justice then consists of skilful partizans of controversies. The lawyers sustain this function. It is not, then, their part to consider the moral or legal aspects of a case, unless asked to do so. The lawyer's business is to champion his side of the case. His opponent will champion the other. The system must be relied upon for a correct result. The lawyer must remember that he is only a wheel in the machine. Let each part of the machine confine itself to its own function. Thus will it best aid in the proper working of the whole. Let not the lawyer usurp the place of the court or jury. What confuses the matter is that the lawyer is paid by his client to champion his side, and thus he comes to look like a Swiss mercenary.

But suppose that this were otherwise. Let us imagine a state where the court and juries are assisted by a class of men called ministers of the court, who are paid regular

salaries by the state, just like the judges. When any person desires to bring a law suit, let us suppose that he goes to the clerk of the court, who issues a writ to bring the other party before the court; after which, one of the ministers of the court is assigned by the judge to each side, whose duty it is to develop its full strength. Here we have a clear view of the machine of justice, and see the proper relation of every part. Who would blame these ministers of the court for earnestly endeavoring to impress their respective reasonings upon the tribunal? What does it matter if each one takes the most extreme positions upon his side? So much the better. Thus will they most efficiently assist the impartial judge and jury.

Now, does it alter the case that these ministers of the court are called lawyers, and stimulated by compensation and the desire of victory and reputation to put forth their utmost exertions? Of course, it sometimes happens that, through the inequality of the champions, the worse is made to appear the better cause. Our Nashville Boanerges may be upon one side of the case with his United States Digest, and desk-full of fixed ammunition, and his rifle-cannon of an intellect to send it straight to the mark; and upon the other may be some weak brother, whose whole brains might be hidden under his antagonist's bump of comparison. This defect is inherent in the system. But will any one contend that Boanerges ought to cripple himself so as not to over-match his adversary? If a better system can be devised, let us have it. But let us not blame the parts of the system we have got for working just as the system requires that they should work. We would remark, in passing, that practically this question could in any view rarely exercise the legal conscience. For it not very often happens that a lawyer recognizes his side of the case as the wrong one. We know an able lawyer at the Nashville bar, who never lost a case in his life without feeling that justice had been grossly outraged. It used to be said of another member of the same bar, now deceased, that he never went into a law suit without a firm conviction that his client's antagonist was a d——d rascal, and a strong suspicion that his lawyer had, in this respect, not much the advantage of him.

But we think we have shown that, so long as the lawyer confines himself strictly to his function of advocacy, it is no concern of his whether his side is the right one or not. If he goes beyond this, and

resorts to any subterfuges, or throws his personal influence into the scale, that is, of course, another matter.

The popular estimate of lawyers in the concrete is the most complete refutation of the popular notion of them in the abstract. For, as we have already shown, no class of men are more sincerely respected, more implicitly trusted, or more highly honored.

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*An English View of the Legal Profession in America.*

[From Macmillan's Magazine.]

Among English institutions there is, perhaps, none more curiously and distinctively English than our bar, with its strong political traditions, its aristocratic sympathies, its intense corporate spirit, its singular relation (half of dependence, half of patronage) to the solicitors, its friendly control over its official superiors, the judges. Any serious changes in the organization of such a body are sure to be symptomatic of changes in English society and politics at large, and must have an influence far beyond the limits of the profession. Such changes have, of late years, begun to be earnestly discussed; and in the prospect of their attracting much attention during the next few years, it becomes a matter of more than merely speculative interest to determine how far the arrangements of our bar are natural, how far artificial; or in other words, to ascertain what form the legal profession would tend to assume if it were left entirely to itself, and governed by the ordinary laws of demand and supply. Suppose a country where this has happened, where the profession, originally organized upon the English model, has been freed from those restrictions which ancient custom imposes on it here,—what new aspects or features will it develop? Will the removal of these restrictions enable it better to meet the needs of an expanding civilization? And will this gain, if attained, be counterbalanced by its exposure to new dangers and temptations? Such a country we find beyond the Atlantic: a country whose conditions, however different in points of detail from those of England, are sufficiently similar to make its experience full of instruction for us.

When England sent out her colonies, the bar, like most of our other institutions, reappeared upon the new soil, and soon gained a position similar to that it held at home; not so much owing to any deliberate purpose on the part of those who led and ruled the new communities (for the Puritan settlers, at least, held lawyers in slight esteem), as because the conditions of a progressive society required existence. That disposition to simplify and popularize law, to

make it less of a mystery and bring it more within the reach of an average citizen, which is strong in modern Europe, is, of course, nowhere so strong as in the colonies, and naturally tended in America to lessen the individuality of the legal profession and do away with the antiquated rules which had governed it at home. On the other hand, the increasing complexity of relations in modern society, the development of so many distinct arts and departments of applied science, brings into an always clearer light the importance of a division of labor, and, by attaching greater value to special knowledge and skill, necessarily limits and specializes the activity of every profession. In spite, therefore, of the democratic aversion to class organizations, the lawyers in America soon acquired professional habits and an *esprit de corps* similar to that of their brethren in England; and some forty years ago they enjoyed a power and social consideration relatively greater than the bar has ever held on this side the Atlantic. To explain fully how they gained this place, and how they have now to some extent lost it, would involve a discussion on American politics generally. I shall not, therefore, attempt to do more than describe some of those aspects of the United States' bar which are likely to be interesting to an English lawyer, indicating the points in which their arrangements differ from ours, and endeavoring to determine what light their experience throws on those weighty questions regarding the organization of the profession which are beginning to be debated among us.

In the United States, as in most parts of Europe and most of our colonies, there is no distinction between barristers and attorneys. Every lawyer, or "counsel," which is the term whereby they prefer to be known, is permitted to take every kind of business: he may argue a cause in the Supreme Federal Court at Washington, or write six-and-eightpenny letters from a shopkeeper to an obstinate debtor. He may himself conduct all the proceedings in a cause, confer with the client, issue the writ, draw the declaration, get together the evidence, prepare the brief, and manage the trial when it comes on in court. Needless to add that he is employed by and deals with, not another professional man as our barristers do, but with the client himself, who seeks him out and makes his bargain directly with him, just as we in England call in a physician or make our bargain with an architect. In spite, however, of this union of all a lawyer's functions in the same person, considerations of practical convenience



have in many places, established a division of labor similar to what exists here. Partnerships are formed in which one member undertakes the court work and the duties of the advocate, while another or others transact the rest of the business, see the clients, conduct correspondence, hunt up evidence, prepare witnesses for examination, and manage the thousand little things for which a man goes to his attorney. The merits of the plan are obvious. It saves the senior member from drudgery, and from being distracted by petty details; it introduces the juniors to business, and enables them to profit by the experience and knowledge of the mature practitioner; it secures to the client the benefit of a closer attention to details than a leading counsel could be expected to give, while yet the whole of his suit is managed in the same office, and the responsibility is not divided, as in England, between two independent personages. Nevertheless, owing to causes which it is not easy to explain, the custom of forming legal partnerships is one which prevails much more extensively in some parts of the Union than in others. In Boston and New York, for instance, it is common; in the towns of Connecticut, and in Philadelphia one is told that it is rather the exception. Even apart from the arrangement which distributes the various kinds of business among the members of a firm, there is a certain tendency for work of a different character to fall into the hands of different men. A beginner is of course glad enough to be employed in any way, and takes willingly the smaller jobs; he will conduct a defense in a police-court, or manage the recovery of a tradesman's petty debt. I remember having been told by an eminent counsel that when an old apple-woman applied to his son to have her market-license renewed, which for some reason had been withdrawn, he had insisted on the young man's taking up the case. As he rises, it becomes easier for him to select his business, and when he has attained real eminence he may confine himself entirely to the higher walks, arguing cases and giving opinions, but leaving all the preparatory work and all the communications with the client to be done by the juniors who are retained along with him. He is, in fact, with one important difference, to which I shall recur presently, very much in the position of an English Queen's Counsel, and his services are sought, not only by the client, but by another counsel, or firm of counsel, who have an important suit in hand, to which they feel themselves unequal. He may, however, be, and often is, retained

directly by the client ; and in that case he is allowed to retain a junior to aid him, or to desire the client to do so, naming the man he wishes for, a thing which the etiquette of the English bar forbids. In every great city there are several practitioners of this kind, men who only undertake the weightiest business at the largest fees ; and even in minor towns court practice is in the hands of a comparatively small knot of people. In one New England city, for instance, whose population is about 50,000, there are, one is told, some sixty or seventy practicing lawyers, of whom not more than ten or twelve ever conduct a case in court, the remainder doing what we call attorney's and conveyancer's work.

Whatever disadvantages this system of one undivided legal profession has, and it will appear that they are not inconsiderable, it has one conspicuous merit, on which any one who is accustomed to watch the career of the swarm of young men who annually press into the Temple or Lincoln's Inn full of bright hopes, may be pardoned for dwelling. It affords a far better prospect of speedy employment and an active professional life, than the beginner who is not "backed," as we say, can look forward to in England. Private friends can do much more than with us to help a young man, since he gets business direct from the client instead of from an attorney ; he may pick up little bits of work which his prosperous seniors do not care to have, may thereby learn those details of practice of which, in England, a barrister often remains ignorant ; may gain experience and confidence in his own powers, may teach himself how to speak and how to deal with men, may gradually form a connection among those for whom he has managed trifling matters, may commend himself to the good opinion of older lawyers, who will be glad to retain him as their junior when they have a brief to give away. So far he is better off than the young barrister in England. He is also, in another way, more favorably placed than the young English attorney. He is not taught to rely in all cases of legal difficulty upon the opinion of another person. He is not compelled to seek his acquaintances among the less cultivated members of the profession, to the great majority of whom law is not much of an art and nothing of a science. He does not see the path of an honourable ambition, the opportunities of forensic oratory, the access to the judicial bench, irrevocably closed against him, but has the fullest freedom to choose whatever line his talents fit him for. Every En-

English lawyer's experience, as it furnishes him with cases where a man was obliged to remain an attorney who would have shone as a counsel, so it certainly suggests cases of persons who were believed, and with reason believed, by their friends, to possess the highest forensic abilities, but literally never had the chance of displaying them, and languished on in obscurity, while others, every way inferior to them, became, by mere dint of practice, fitter for ultimate success. Quite otherwise in America. There, according to the universal witness of laymen and lawyers, no man who is worth his salt, no man who combines fair talents with reasonable industry, fails to earn a competence and to have, within the first six or seven years of his career, an opportunity of showing whether he has in him the makings of something great. This is not simply due, as might easily be supposed, to the greater opportunities which every body has in a new country, and which make America the workingman's paradise, for, in the Eastern States, at least, the professions are pretty nearly as much crowded as they are in England; it is owing to the greater variety of practice which lies open to a young man, and to the fact that his patrons are the general public, and not, as in England, a limited class, who have their own friends and connections to push. Certain it is, that American lawyers profess themselves unable to understand how it can happen that deserving men remain briefless for the best years of their life, and are at last obliged to quit the profession in disgust. In fact, it seems to require an effort of politeness on their part to believe that such a state of things can exist in England and Scotland as that which we have grown so familiar with that we accept it as natural and legitimate. A further result of the unity of the whole profession may be seen in the absence of many of those rules of etiquette which are, in theory at least, strictly observed by the English lawyer. It is not thought undignified, except in the great cities of the Eastern States, for a counsel to advertise himself in the newspapers: in Canada, as well as in the States, one frequently sees respectable firms soliciting patronage in this way. A counsel is allowed to make whatever bargain he pleases with his client: he may do work for nothing, or may stipulate for a commission on the result of the suit, or even for a certain share in whatever the verdict produces—a practice which is open to grave objections, and which, in the opinion of more than one eminent American lawyer, has produced a good deal

of the mischief which caused it to be, seventeen centuries ago, prohibited at Rome. The sentiment of the Boston bar seems to be on the whole, opposed to the practice, but, so far as one can learn, there is no rule against it there or elsewhere. A counsel can bring an action for the recovery of his fees, and, *pari ratione*, can be sued for negligence in the conduct of a cause.

Respecting the condition of legal education, a subject on which so much has been said and written in England these last few months, it is hard to say anything general which shall also be true. (Most of our errors about the United States arise from the habit of taking what is true of some one place, to be true generally. New York, for instance, is supposed by most English visitors to be typical, which is a good deal more absurd than for a stranger to take Liverpool as typical of England.) Like ourselves, the Americans have no great feeling for *die Wissenschaft*, and law is with them, as in England, much more an art than a science. One hears very little said about the value of studying it theoretically, nor is any proof of such study required from candidates for admission to the profession. But, as a matter of fact, the provision for instruction in law is as good, or better, all things considered, than in England, and is certainly more generally turned to account. Harvard, which stands in the front rank of American Universities, has a most efficient law-school, with three permanent professors, and several (at present four) occasional lecturers, among them men of the highest professional reputation, who undertake the work more for the love of it than for the inadequate salaries offered, and worthily sustain the traditions of Judge Story, some of whose great works were delivered as lectures to a Harvard class. In New York, the Institution called Columbia College is fortunate in possessing a professor of great legal ability and an extraordinary gift of exposition; whose class-rooms, like those at Harvard, are crowded by large and highly intelligent audiences. Better law-teaching than Mr. Dwight's it is hardly possible to imagine; it would be worth an English student's while to cross the Atlantic to attend his course. Many of the lesser Universities and Colleges have attached to them law-schools of greater or less fame, but sufficient to bring some sort of instruction within the reach of any one who cares to have it. The teaching given is of a definitely practical character, and bears only on our English and American Common Law and Equity. Jurisprudence, using the term to mean the science of law

in general, is not recognized as a subject at all; nor is the Civil Law regularly studied any where in the northern or middle States; international law, where taught, is usually deemed a part of the literary or historical, not of the legal course. Attendance on law classes is purely optional, so that the demand which exists may be taken to prove the excellence of the article supplied.

The right of admitting to practice is in all or nearly all the States, vested, or supposed to be vested, in the judges, who usually either delegate it to the bar, or appoint on each occasion one, two, or three counsel to examine the candidate. Occasionally, as for instance in Philadelphia, he is required to have read for a fixed period in some lawyer's office, but more commonly nothing more than an examination is demanded, and the examination, nowhere severe, is often little better than a form. In Massachusetts applicants may be, but are rarely, plucked; in New York, less scrupulous in this, as in most respects, than other cities, the whole thing is said to be a farce, and people whose character and whose attainments are equally unsatisfactory, find their way into the profession. Unless the opinion of their fellow citizens does them great injustice, many of the New York judges are not quite the men to insist on a rigid standard of professional honor and capacity. An admission in any one State gives a title to practice within its limits only; but practically, he who has been admitted in one State finds no difficulty of being admitted *pro forma* to the court of another in which he may happen to have a case. On the whole, it may be said that very little care is taken in America to secure the competence of practitioners. In this, as in other matters, the principle of *laissez faire* is trusted to, and the creditably high level of legal knowledge and skill in the best States is due rather to a sense of the value of systematic instruction among the members of the profession itself, than to the almost nominal entrance examination. The experience of America seems on the whole, to confirm the main conclusion of Mr. Dicey's singularly clear and vigorous article on legal education, that our chief aim ought to be to provide thoroughly good instruction in law, and that examinations should rather be used to test this instruction than trusted to as in themselves sufficient to produce a body of competent practitioners.

The strictly practical character of the legal instruction given, good as much of it is, has been followed by one unfortunate result. There is but a slight interest in the scientific propriety of law, or in the

discussion of its leading principles, an American lawyer seems quite as unwilling to travel out of the region of cases as any disciple of Lord Kenyon or Mr. John William Smith could have been. More has been done in the way of law reform there than here in England, for the Americans are more impatient of practical inconveniences than we are, more dexterous in getting rid of them, and less hampered by the complexity and slowness of their political machinery. Most, if not all, of the northern States, have codified their statutes, have united legal and equitable jurisdiction in the same court, and greatly simplified the law of real property. But this has all been done in a sort of rough and ready way, with no great attention to elegance of form. The codification of case-law has (I speak again of the northern and eastern States) been very little discussed, and the attempts made are, in a scientific point of view, far from satisfactory. Among the individual American lawyers there are many men of the highest powers—men whose learning and acumen would have put them in the forefront of the bar in England had they lived here, and enabled them to rival the best of our English judges. But those who take a speculative interest in law, and study its philosophy and its history, seem to be extremely few, fewer than in England. As every lawyer practices both law and equity, and as the bulk of the law altogether is much smaller than in England, an average New England town-practitioner has probably a better general knowledge of the whole field than a person of corresponding talents and standing in this country, and is probably smarter and quicker in using his knowledge. On the other hand, there are fewer men who are masters of a special department; the judges are in most States (Massachusetts is a conspicuous exception) inferior people, whose decisions carry little moral weight, and before whom counsel naturally acquire a comparatively slovenly habit of arguing. There is, therefore, some danger that the case-law may gradually decline, may grow looser and less consistent; while from unlearned popular bodies, such as the State Legislatures, no finished legislation can be expected. In this condition of things, the value not only of the reports of the Federal Courts, whose judges are mostly persons of some mark, but of our own English reports, is very great. Pretty nearly every lawyer of standing takes in the Law Reports as they appear, and the decisions contained in them, although not legally binding, are cited with as much readiness and enjoy as much moral weight as they do here.



An English judge can have no more legitimate subject for pride than in reflecting that every decision he gives—I might say, every dictum he utters—is caught up, and bears with it almost the force of law over the vast territory that stretches from the Bay of Fundy to the Golden Gate.

As in the United States, the bar includes the whole mass of the attorneys as well as those whom we should call barristers, its social position ought to be compared with that of both the branches of the English profession taken together. So regarded, it seems to be somewhat higher than in England; naturally enough, when we remember that there is no hereditary aristocracy to overshadow it, and that, in the absence of a titled class, a landed class, and a military class, the chief distinction which common sentiment can lay hold of as elevating one set of persons above another, is the character of their occupation, and the degree of culture and intelligence which it implies. Such distinctions, however, carried more weight in days when society was smaller, simpler, and less wealthy than it has now become. The growth of great mercantile fortunes has, in America, as in England, and perhaps even more notably there, lowered the relative importance and dignity of the bar. An individual merchant holds perhaps no better place compared with an average individual lawyer than he did forty years ago; but the millionaire is a much more frequent and potent personage than he was then, and outshines everybody in the country. Now and then a great orator or a great writer achieves fame of a different and higher kind; but in the main it is the glory of successful commerce which in America and Europe now draws admiring eyes. Wealth, it is true, is by no means out of the reach of the leading lawyers; yet still not such wealth as may be and constantly is amassed by contractors, share speculators, hotel proprietors, newspaper owners, and retail storekeepers. The incomes of the first counsel in cities like New York are probably as large as those of the great English leaders; one firm, for instance, is often mentioned as dividing a sum of 250,000 dollars a year, of which the senior member may probably have 100,000. It is, however, only in two or three of the greatest cities that such incomes can be made, and one may doubt whether there are ten or fifteen counsel in the whole country who, simply by their profession, make more than fifty or sixty thousand dollars a year.



Next after wealth, education and power, may be taken to be the two elements or qualities on which social standing in a new and democratic country depends. As respects education, the bar stands high—higher, it would seem, than either of the two other learned professions, or than their new sister, journalism. Most lawyers have had a college training, and are by the necessity of their employment, persons of some mental cultivation; in the older towns they (in conjunction with the professors of the University, where there is one) form the intellectual *elite* of the place, and maintain worthily the literary traditions of the Roman, French, and English bar. It is worth noting, that the tendency of their professional training is, there as well as here, to make them conservative in professional matters. They have the same dislike to theories, the same attachments to old forms, the same cautiousness in committing themselves to any broad legal principle, which distinguish the orthodox type of the English lawyer, and tend to reproduce faithfully on the shores of the Mississippi the very prejudices which Bentham assailed eighty years ago, at a time when those shores were inhabited only by Indians and beavers. In Chicago, a city of yesterday, special demurrers, replications *de injuria*, and all the elaborate formalities of pleading which were swept away by our Common Law Procedure Acts, flourish and abound to this day. As for power, the power of the bar in politics is considerable, although the rise of a class of professional politicians has of late years, weakened it. The affairs of private persons are of course, to a great extent, in their hands; but the simpler state of the law, especially the law of land, and the absence of complicated settlements, make a man rather less dependent on his solicitor than an English country gentleman is almost certain to be. The machinery of local government is largely worked by the lawyers, and the conduct of legislation (so far as it is not of a purely administrative character, or does not touch on popular questions) is left to them; that is to say, if any permanent change is to be made in the private law of the community, or in procedure, the lay public can hardly help trusting them. When they act together as a class upon class questions, they can put forth very great strength. In some States it is entirely the will of the lawyers that has delayed law reforms, and in a good many, where the judiciary is elective, a fairly respectable selection of judges is ensured by the joint action of the

bar, whose nominees are usually accepted by the bulk of sensible lay citizens. This happens, one is told, in Philadelphia, as well as in Chicago and many cities of the West.

The decline of the influence of the bar in politics opens up a group of historical questions which one can only touch on, and which a stranger can indeed hardly hope to have mastered. In the earlier days of the Republic lawyers played a great part, as lawyers have done wherever free government exists. So in England, long before the days of Somers; so still more conspicuously in France, most of the leaders whom each revolution has brought to the top have been men of the robe, as Grevy, Favre, Gambetta, and other people of eminence are now. In America, most of the Presidents, indeed nearly all, except the soldiers, have been lawyers; witness, among others, the last four, Fillmore, Buchanan, Lincoln and Andrew Johnson. So too, were Webster and Clay; and so, to come down to the notable and the notorious men of to-day, are Seward, Sumner, John T. Hoffman, B. F. Butler, A. O. Hall. The absence of any permanently wealthy and influential class, such as the landed gentry form in England, gives the American advocate a special advantage in public life, over and above those which he derives from his practice in speaking and his habit of dealing with legal questions; and he finds another in the fact, that such constant reference is made in American politics to the written Constitution. Those who have been trained to interpret it are allowed to claim the position of political hierophants, the stewards of sacred mysteries.

This predominance belonged to the lawyers in De Tocqueville's time, and he rejoiced to see it. Since then, however, great changes have passed upon the country. Politics have become a profession—latterly, a gainful profession—and the more gainful the less honorable. The great extension of public works, especially of railways, has put immense pecuniary interests at the disposal of Congress, and of the State Legislatures. The unfortunate practice of making all the appointments in the Civil Service temporary, and giving them for political reasons, has become established, and various other ways have been discovered of making politics pay. The formation of a class of men who devote themselves to politics solely, (some of whom, of course, were originally lawyers,) has done a good deal to jostle the legitimate lawyers out of political life, and probably something also to lower the average tone of those who still mingle in it. The extent

to which this evil—for such it must be called—prevails, varies in different places, according to the character of the population. New York is, of course, conspicuously the worst; the most prominent leaders of the Irish rabble, which has latterly governed it, being men whom, whatever their profession, no respectable lawyer would recognize as social equals. There are, however, a good many other places where a barrister of high character and legal note would feel that, in throwing himself into politics, he was entering a distinctly lower arena than that of the law-courts, and undertaking to deal with people among whom he must not expect to find the same sense of honor and the same mental refinement which he was accustomed to among his professional brethren. The men who now lead the profession in the United States, certainly do not carry their due weight in politics.

Whether it is true, as one is so often told in America, that the corruptions of politics have affected the tone of the bar itself, is a question on which a stranger's impressions are worth little or nothing. In America, as in England, there is a considerable tendency to exaggerate the present evils of the country, and one never knows how much deduction to make. There is no doubt, however, that the distinctive character of the bar, as a profession, separated by its usages from the rest of the community, and bound by peculiar rules, is much less marked than in England. The levelling and equalizing tendency which has been already noted as potent in modern civilization, is most potent under democratic institutions; the spirit which has destroyed class privileges is hostile to any thing that marks off any set of men from the rest of the community, and does not spare even a professional organization in such slight external badges of caste as a professional dress. Neither wig, bands, gown, nor any other peculiar dress, is worn by the American barrister, nor even by the American judge, save only by the members of the Supreme Court, who appear in gowns when they sit at Washington.

This point is forcibly put by an able writer in the *American Law Review* for April, 1861:—

“Lawyers are rightly called the most conservative class in a democracy, and their influence in the government pronounced to be the most powerful existing security against its excesses. It follows that the class of politicians who profit by those excesses must be hostile to the legal profession, and the antagonism is none the less real for being unavowed. The people are never jealous of lawyers, they trust the

legal profession because its interest is really the same with their own, and because its intelligence guides them best in pursuing that interest. In doing so it thwarts the demagogue, whose interest it is to flatter popular passion or vanity. The French publicist held the opinion that lawyers would always maintain the lead in a democracy. He could not forecast the influences which, in the last quarter of a century, have so enormously increased the control of mere politicians.

\* \* \* The democratic principle is a slow strong solvent of forms and symbols—so strong that it may even be artfully misdirected to attack the substance and weaken the reality of the thing symbolized. Therefore much of the democratic teaching of the day encourages a sort of unformed notion that the destruction of class peculiarities will have a magical power to efface differences of nature and make all men alike wise, good and happy. Such a notion easily breeds the mistake of regarding superior morality and intelligence as an unwarranted privilege. Any eminence is undemocratic, the *Cleon* of the hour exclaims; superiority of any kind is treason to the great Declaration; and any calling or profession that rests upon such superiority, and maintains and protects itself by cherishing it, is unconstitutional, or we will speedily make it so."

The subject of the article from which I quote is the formation of the Bar Association of New York, and the somewhat gloomy views it expresses seem to be suggested chiefly by the phenomena of that city, which, as has already been remarked, are quite exceptional. It is true, however, that throughout the States the bar is very much less of a caste or guild than it is in England, and that its members are less sensitive to professional opinion. The circumstances of the country, and the pervading faith in the principle of *laissez faire*, have prevented the establishment of any system of professional government: there is no tribunal corresponding to our Inns of Court. The control, which is by law vested in the State judges, is not and could not well be used to much purpose. Even so apparently trivial a circumstance as the absence of a peculiar costume has contributed to weaken the feeling of the collective dignity and responsibility of the profession, and of the duty which each member owes to the whole body—has increased that perilous sense of the loss of the individual in the mass which is so marked in huge and swiftly-changing communities. I am far from meaning to say that, except perhaps in such a place as New York, the want of a stricter system has

as yet been injuriously felt. Where the tone of society is high and pure, as it is in by far the greater part of the country, and conspicuously in New England and the best of the Western States, the tone of the bar is high and pure also. But where bad symptoms have shown themselves, there have been no legal and efficient means of dealing with them.

This state of things has led, in these last few months, to the formation in New York City of a voluntary organization intended to foster the *esprit de corps* of the profession, and enable it to act more effectively in the pursuit of common objects, and above all (although for obvious reasons this has not been prominently put forward) to exercise a sort of social censorship, by excluding or expelling unworthy persons from its membership. So far, this Bar Association is a mere club, with no official position; but it is hoped that it may, some day, acquire regular disciplinary powers. Its leaders are men of the highest character and abilities, and the example they have set in founding it has already been followed by the establishment of similar organizations in Pennsylvania and Maryland.

One naturally asks, what is there that we in England may learn from a survey of the condition and prospects of our profession in the United States? Many of its characteristics are intimately bound up with social and political phenomena unlike those of England, and are therefore to us matters rather of speculative than of practical interest. Others, as for instance the results attained by the schools of law, which have a considerable influence in elevating the tone of the profession, as well as in making it more efficient, deserve to be carefully noted with a view to imitation. And a great deal of light is certainly thrown, by a study of the state of things in America, upon a question which has already been raised in this country, and is likely to be more and more eagerly discussed, especially if our courts are still further localized,—the question whether or no the present separation between barristers and attorneys ought to be maintained. Before concluding, a few words may be said upon this matter.

There are two sets of persons in England who complain of our present arrangements—a section of the solicitors, who are debarred from the exercise of advocacy, and therefore from the great prizes of the profession, as well as, to a considerable extent, from public life; and a section of the junior bar, whose members, depending entirely on the patronage of the solicitors, find themselves, if they happen to

have no private connections among that branch of the profession, absolutely unable to get employment, since a strict code of etiquette forbids them to undertake certain sorts of work, or to do work except on a fixed scale of fees, or to take work directly from a client, or to form partnerships with other counsel. An attempt has been made to enlist the general public in favor of a change, by the argument that law would be cheapened by allowing the attorney to argue and carry through the courts a cause which he has prepared for trial; but so far the general public has not responded.

There are three points of view from which the merits or demerits of a change may be regarded. These are the interests respectively of the profession, of the client, and of the nation and community at large.

As far as the advantage of the profession, in both its branches, is concerned, the example of the United States seems to show that the balance of advantage is in favor of uniting barristers and attorneys in one body. The attorney has a wider field, greater opportunities of distinguishing himself, and the legitimate satisfaction of seeing his cause through all its stages. The junior barrister finds it far easier to get on, even as an advocate; and, if he discovers that advocacy is not his line, is able to subside into the perhaps not less profitable or agreeable function of a solicitor. The senior barrister or leader does no doubt suffer, for his attention is more distracted by calls of different kinds; he is sometimes obliged, even if he has junior partners, to take up petty work for the sake of keeping a client; he finds it less easy to devote himself to a special department of law, and elect to shine in it; he assumes all the weight of responsibility for the whole conduct of the case, which with us is so divided between counsel and attorney that either can charge a miscarriage on the other.

The gain to the client is, perhaps, even clearer; and even those (few, very few) American counsel who say that for their own sake they would prefer the English plan of a separation, admit that the litigant is more expeditiously and effectively served where he has but one person to look to and deal with throughout. It does not suit him, say the Americans, to be lathered in one shop and shaved in another; he likes to go to his lawyer, tell him the facts, get an off-hand opinion, if the case be a fairly simple one (as it is nine times out of ten), and issue his writ with some confidence: whereas, under the English system, he would either have to wait till a regular case



for the opinion of counsel was drawn, sent to a barrister, and returned written on, after some days, or else take the risk of bringing an action which turned out to be ill-founded. It may also be well-believed that a case is, on the whole, better dealt with when it is kept in one office from first to last, and managed by one person, or by partners who are in constant communication. Mistakes and oversights are less likely to occur, since the advocate knows the facts better, and has almost invariably seen and questioned the witnesses before he comes into court. It may indeed be said that an advocate does his work with more ease of conscience, and perhaps more *sang froid*, when he knows nothing but his instructions. But American practitioners are all clear that they are able to serve their clients better than they could if the responsibility were divided between the man who prepares the case, and the man who argues or addresses the jury.

The client, however, is also a member of the nation, and the nation has an interest, over and above that which some of its members have as litigants, in the administration of justice and the well-being of the legal profession. It is concerned to have the scientific character of the law maintained and the work of legislation done, not only with substantial good sense, but with elegance and symmetry of form. It is also concerned to see that those whose occupation makes them the natural guardians of the law and a check upon any misconduct of the bench, should maintain their influence and exercise it with zeal and public spirit. The political functions of the legal profession, important in all States, are perhaps most important in a democracy, where it is an element of permanence, advising and controlling the ever-fluctuating currents of popular opinion. These functions cannot be rightly discharged unless the profession sets an example to the country of purity, dignity and self-control. Now the most important part of the profession, for political purposes, is that part, corresponding to the bar in the English sense of the term, which is in direct contact with the judges, which conduct causes in the courts, which cultivates oratory, and thereby influences representative assemblies and public meetings. This comparatively small body can, owing to its very smallness, be kept under strict control, may cherish a strong professional feeling, and may therefore be with safety allowed certain exceptional privileges. In the immense mass of the whole profession it is all but impossible to maintain an equally



high standard of honor and duty. The scientific character of the law, its precision and philosophical propriety, may perhaps be best secured by setting apart (as in England) a section of the profession who can the better devote themselves to it in that they are not distracted by undertaking work which is not properly legal, such as is much of the work done in an attorney's office. The conscience or honor of a member of either branch of the profession is exposed to less strain where the two branches are distinct. The counsel is under less temptation to win his cause by foul means, since he is removed from the client by the interposition of the attorney, and therefore less personally identified with the success of the client's scheme. His relation to the judge is a more independent one than if his fee were to depend on his success in the suit, as it does where a share of the proceeds or a commission on the proceeds is given to the advocate, a practice hard to check where the advocate is also the attorney: he is therefore less likely to lead a judge astray or to take advantage of a judge's corruption. He probably has not that intimate knowledge of the client's affairs which he must have if he had prepared the whole case, and is therefore less likely to be drawn into speculating, to take an obvious instance, in the shares of a client company, or otherwise playing a double and disloyal game. Similarly it might be shown that the attorney also is less tempted than if he dealt immediately with the judge, and were not obliged, in carrying out the schemes of a fraudulent client, to call in the aid of another practitioner, amenable to a strict professional discipline. And lastly, it is urged that where, as in England and generally in America, judges are taken exclusively from the bar (whereas on the Continent the judicial profession is distinct from that of advocacy), it becomes specially important to provide that no one shall mount the bench who has not proved his talents as an advocate, and acquired in that capacity the confidence of the public.

Such are some of the arguments which one hears used in America as grounds for preferring the double system, and they are worth considering, although it may well be thought that their force would be greatly diminished if some more effective tribunal existed than now exists there for trying and punishing professional offenses.

Which way the general balance of advantage lies is too intricate a question to be discussed at the end of a paper. But most people will admit that our present English rules are not satisfactory, and that

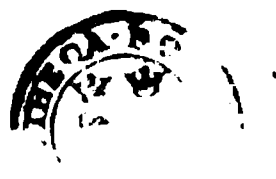
the example of America is on the whole in favor of a somewhat freer system. It has, for instance, been suggested that there should be an easier and quicker passage from either branch of the profession to the other than is now permitted here; that barristers should be allowed to be retained directly by the client, even though he must have the attorney's part of the work done by an attorney; that barristers should be permitted to form partnerships among themselves, and to do work for lower fees than etiquette now allows, even gratis if they wish, maintaining, however, the prohibition to bargain for the payment by the result. It is argued, and with much force, that there is no reason why students preparing for the one branch of the profession should not be educated along with candidates for the other, and allowed to compete in the same examinations. In any case, it is pretty clear that a change of some kind will come, or rather that the changes already begun by the establishment of the County Courts will be carried further. There is still time to provide that such change should take a good form, and should not consist, as some reformers wish it to do, simply in the absorption of the bar by the attorneys. This, I venture to think, would be a misfortune, not perhaps for the present members of the bar, but for the country at large.

Our English bar and bench have been in so wholesome a state for the last two centuries, despite the political crisis we have passed through, that we are perhaps too apt to fancy such a state of things normal, and to undertake the dangers of a lapse. The circumstances of New York City, whose judges were forty years ago as reputable as those who sit at Westminster, is a serious warning that the evils whose existence we have so often heard of in Spain, Italy and France, may come to prevail in English-speaking communities also. As fresh pestilences arise when the old forms of disease seem worn out, so the perpetual vices of mankind assume a new shape in a new era, being in substance still the same. In the Middle Ages the perversions of justice were mostly due to the oppressions of a king, or of powerful nobles; now fraud takes the place of violence, and we have to fear the influence of huge masses of ignorant men swayed by unscrupulous leaders, and of prodigious accumulations of wealth in the hands of individuals and companies. Fortunately, the danger in America is less than it might appear, less than it would be in a small country like England. The territory is so extensive, the different

States so independent, and in many respects so unlike one another, the general tone of the population so healthy, that the infection need not spread quickly, and may be checked (as at this moment in New York) before it has spread far. The moral, however, which the bare existence of such mischiefs teaches, is none the less grave. That moral is, in its most general form, the extreme importance of repressing corruption in all its forms; and in doing so, of not simply trusting to public opinion, however sound for the moment, but of providing some regular means of noting and pouncing upon the evil in its first beginnings. More particularly, it suggests to us the desirability of doing every thing to enhance the dignity of the judicial office, and to quicken in its holders a sense of their responsibilities; and it warns us keep within moderate limits the jurisdiction of local courts, whose judges have not that protection against dangerous influences which their social position, their incomes, and a watchful public opinion, give to the eminent men who sit in the Superior Courts of Common Law and Equity.

The example of our country is of the more consequence, as it influences so many communities elsewhere, and especially in the colonies,—communities exposed to dangers and temptations similar to those of New York. That its example is on the whole so good, is legitimate matter for satisfaction. Much has been said lately of the decadence of England; nor is there any harm in having our weaknesses pointed out, so long as suspicion is not thereby sown between ourselves and our true natural allies. But no country can be in a state of decay while it continues to uphold public purity—the purity of the bar, of the bench, and of political life. Such purity is not only a chief source of a people's happiness, but the great source of its strength; for it is the foundation of that mutual confidence between citizen and citizen, between the governors and the governed, on which, in moments of national peril, everything depends.

JAMES BRYCE.



## SELECTED DIGEST OF STATE REPORTS.

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[For the present number of the Digest, selections have been made from the following volumes of State Reports: 15 Minnesota; 33 Indiana; 58 Maine; 39 California; 25 Wisconsin; 8 Rhode Island; 4 West Virginia; 7 Kentucky (Bush.); 52 Illinois; 42 Vermont.]

### ABATEMENT.

1. It is no cause for demurrer, on an action of debt on a negotiable note, that a party defendant is described in the declaration as "H. D. McClintis." If there be any misnomer it should be pleaded in abatement, or the defendant on his own motion and affidavit, should have the declaration amended by inserting the proper name. *Handly vs. Ludington et al.*, 4 West Va., 53.

2. The pendency of an action of trespass against a deputy-sheriff for his wrongful acts done under color of his office, can not be pleaded in abatement in an action against the sheriff for the same cause: *Severy vs. Nye*, 246; 58 Maine.

3. In an action on a promissory note, signed by the defendants as directors, wherein a voluntary association called the "Machias Mining Company," promise to pay Ellis M. Smith or order, the sum named at the time specified: *Held*, that all the members of the association, if any, being liable, the action should be against all; but that the action against the defendants alone is maintainable, unless they plead in abatement the non-joinder of their associates: *McGreary vs. Chandler*, 58 Maine, 537.

ACCEPTANCE.—See ADMINISTRATION, 5; BILLS OF EXCHANGE, &c., 2.

### ACCORD AND SATISFACTION.

A. being liable to B. in a large sum and claiming that C. was liable to him, B. accepted a small sum from A. in full satisfaction, upon the condition proposed by A. that he would forego the enforcement of his claim against C. Afterwards A. violated the condition

and collected his demand from C. by suit. *Held*, that A. could not claim that B.'s demand was satisfied: *Kingan et al. vs. Gibson*, 33 Indiana, 53.

See CONTRACT, 20.

### ACTION.

1. If a person voluntarily, and without mistake of facts, pays or gives money to another, he can not maintain an action to recover it: *Smith vs. Schroeder*, 15 Minn., 35.

2. In case of a deed absolute on its face but in fact a mortgage, if no attempt has been made by the grantee to foreclose the equity of redemption under it as a mortgage, and the right to foreclose is not barred by the statute of limitations, the grantor may maintain his action to have relief that the deed be declared a mortgage, and he be permitted to redeem: *Holton vs. Meighen*, 15 Minn., 69.

3. A husband can not, even with his wife's consent, maintain an action in his own name alone, for an injury to his wife's horse occasioned by a defect in the highway, while he, having exclusive possession and control of the horse with the wife's consent, was driving along the road alone: *Green vs. Inhabitants of North Yarmouth*, 58 Maine, 54.

4. A child of nine years, who, in the day-time, jumps from a sidewalk, lawfully constructed by a railroad company on the side of its railway bridge, upon the properly constructed draw, while the same is being lawfully closed, is so wanting in ordinary care and prudence as not to be entitled to maintain an action for the injury resulting therefrom: *Brown vs. E. & N. A. R. R. Co.*, 58 Maine, 384.

5. A party may waive his right of action against the sheriff and bring it against the deputy for a breach of a direct covenant to the party suing: *Winterbower vs. Haycraft*, 7 Ky., (Bush.,) 57.

6. A deputy sheriff receipted for and covenanted to collect fee bills. For failing to pay over money so collected, an action may be brought against him on the covenants of his receipts: *Ibid*.

7. The right of action in favor of the indorser against those bound with or for him, accrues only upon the payment of the bill by him: *Bowman vs. Wright*, 7 Ky., (Bush.,) 375.

8. An indorser who pays or is compelled to pay a bill of exchange has a right of action on the implied liability resulting from the payment against any party who was bound before him or liable to contribute to the payment of the debt: *Ibid*.

9. Distributees can not sue jointly and recover a joint-judgment against the administrator for an alleged balance of their several shares of the amount found due to them by settlement: *Pelly vs. Bowyer*, 7 Ky., (Bush.,) 513.

10. Unless the objection for the misjoinder is waived, there is no authority for uniting as co-plaintiffs, several parties having separate and independent rights of action against the same defendant, or for a joint recovery thereon: *Ibid.*

11. A surety paying a debt may sue a co-surety separately, or as a joint defendant with the principal, when and as often as he makes payments: *Robinson vs. Jennings*, 7 Ky., (Bush.,) 630.

12. Right of action for personalty on the death of the party vests in his personal representative: *Hull vs. Deatly's Administrator*, 7 Ky., (Bush.,) 687.

13. Assumpsit can not be maintained for use and occupation, unless the relation of landlord and tenant has existed between the parties, and not then except on an express or implied promise of payment: *Hull et al. vs. Jacobs*, 7 Ky., (Bush.,) 595.

14. If upon a plaintiff's own showing, it appears that his cause of action arises from a violation on his part of a positive law, his suit will not be sustained, and the action must equally fail, though the illegal act be only one of a series of facts necessary to sustain the claim: *Whelden vs. Chappel*, 8 Rhode Island, 230.

15. Where the defendant in an action of assumpsit, asked an instruction to the jury, which was given, and which when considered in the light of the evidence in the case, amounted to an admission of his liability, it was *held*, the jury finding in strict accordance with such instruction, no question as to the form of the action could be raised: *Parker vs. Tiffany*, 52 Illinois, 286.

16. A creditor by note and mortgage may obtain a judgment on the note, and subject property other than that embraced in the mortgage to its payment: *Karnes vs. Lloyd et al.*, 52 Illinois, 114.

17. Where two or more have a joint interest in the damage caused by the destruction of buildings by fire through such fault of another as would make him answerable therefor, they may maintain a joint action for the loss without having jointly the legal title in the buildings destroyed: *Cleveland vs. Grand Trunk R. R. Co.*, 42 Vermont, 449.

18. For the purpose of avoiding the statute of limitations, the time

of issuing the writ is the commencement of the suit, if it is duly served and returned within the time therein limited. For other purposes, service of the writ is regarded as the commencement of the suit: *Kirby vs. Jackson*, 42 Vt., 552.

19. In order to constitute the commencement and pendency of an action, in any such sense that the pendency of a prior suit would abate the latter, the service of the writ in the latter suit must have been such as would call the defendant to answer to the second suit, and if notice of the discontinuance of the former suit is given the defendant before service is completed, so as to require him to answer the suit, the two suits are not pending at the same time, and the first will not abate the second: *Ib.*

See ABATEMENT, 3; ASSAULT AND BATTERY, 1; ASSIGNMENT, 3; APPEAL. ASSUMPSIT, 4; CORPORATION, 1; DEED, 3.

#### ADMINISTRATION, &C.

1. A surviving partner should never be appointed administrator on the estate of his deceased partner, because, as such survivor, he becomes accountable to the estate, and could not well account to himself as its representative: *Howard vs. Single Administrators*, 52 Illinois, 336.

2. A claim against an estate, bearing such marks as induced a suspicion of its fairness, was not presented until three years after the death of the intestate. This delay in presenting the claim was regarded as so important a circumstance for the consideration of the jury in determining whether the claim ought to be paid, that a modification by the court below of an instruction asked on behalf of the estate, which would be likely to exclude the consideration by the jury of that circumstance, was held to be ground for reversal of the judgment allowing the claim: *O'Connor, Administratrix, vs. O'Connor*, 52 Illinois, 316.

3. If an estate is not fully settled, and the administrator has exhausted the personal assets in the payment of other debts than his own, he may prove a claim due to himself personally, from the estate, preparatory to obtaining an order to sell the real estate. If he chooses to postpone the payment of his own claim, and the assets are exhausted, he is not prohibited from making application for an order to sell the real estate, and thus convert it into real estate: *Johnson vs. Gillet*, 52 Illinois, 358.



4. Where a will confers power on two executors to lease lands, and one of them fails to qualify, and the other does qualify, the power vests in the latter to execute the lease: *Wisdom vs. Becker, Administratrix*, 52 Illinois, 342.

5. Where an executor accepts a draft drawn upon him by a distributee of the estate, even though the acceptor has money in his hands, in his fiduciary capacity, belonging to the drawer, the estate will not be bound by the acceptance, but only the executor individually: *Ibid*, 342.

See PARTIES, 1.

#### ADVERSE POSSESSION.

1. A purchaser of land at a delinquent tax-sale, does not acquire by his purchase, before the expiration of the time for redemption, any estate or interest in the land as against the owner, but has only a lien thereon for the re-payment of his money, and the statutory interest or penalty: *Brackett vs. Gilmore*, 15 Minn., 245.

2. Where one claims title by adverse possession for the required period, under a claim of ownership, it is competent for him to show that while he occupied he asserted ownership by bringing an action of trespass against others who attempted to enjoy the premises, and prosecuted it to a final termination. For this purpose he may put in evidence, the record of such suit, and the proceedings therein, under instruction that it was not evidence of the title, but was evidence tending to show that he was claiming the land now in dispute: *Hollisler, Administrator, vs. Young*, 42 Vt., 403.

3. A party who has once commenced a possession of land by actual entry, and acts of occupancy on it, may continue to possess it during intervals when not upon it, hence he may claim it during such intervals as well as when actually upon the land doing acts of possession; and the fact of his making such claim is provable by evidence of his declarations made at the time, in the same manner and to the same effect as if made while on the land and doing an act of possession: *Webb vs. Richardson*, 42 Vt., 465.

#### AFFIDAVITS.

1. The plaintiff in a case of interpleader should make an affidavit that there is no collusion between him and any of the other parties: *Starling vs. Brown*, 7 Ky., (Bush.,) 164.

2. As a claim evidenced by a judgment like any other asserted demand, may be unjust or have been paid, or be subject to set-offs or discounts, no reason is perceived from exempting it from the operation of the statute requiring claimants against decedents' estates to verify their demands: *Curry's Administrator vs. Bryant's Administrator*, 7 Ky., (Bush.,) 301.

#### AGENT.

1. An agent employed by two different owners to sell two parcels of real estate brought about an interview between the two owners, who made an exchange—the agent having no agency in the exchange except in bringing about the interview and writing the deeds. *Held*, that the agent was entitled to the customary compensation from each party: *Mullen vs. Ketzleb, et al.*, 7 Ky., (Bush.,) 253.

2. Confessions of a defaulting agent of a railroad company after his discharge from the service of the company are not admissible as evidence against the surety of such agent in an action on his bond for the faithful performance of his duties as agent: *Pollard vs. The Louisville, Cincinnati & Lexington R. R.*, 7 Ky., (Bush.,) 597.

See AUCTIONER, 2.

#### AGENCY.

1. Where an agent is authorized to sell land at a fixed price, and sells it for a greater price, he must account to his principal for the excess: *Kerfoot vs. Hyman*, 52 Illinois, 412.

2. Where an agent was empowered originally, to make a contract for the conveyance of lands of the principal, upon certain conditions, and in making the contract, the agent added other conditions, favorable to his principal, not mentioned in his original authority, and which were afterwards, and before the conveyance of the lands, approved by the principal, who directed the agent to convey according to the conditions so expressed. *Held*, that such action of the principal was a ratification of the act of the agent, in respect to such new conditions, and their binding effect upon the other party to the contract, could not be questioned for the want of authority in the agent to insert them: *Board of Supervisors of Henry Co. vs. Winnebago Swamp Drain Co.*, 52 Illinois, 455.

#### ALTERATIONS.

1. Every material alteration in a note made after its delivery, and

without the consent of the payor, renders it void: *Duker vs. Fraus*, 7 Ky., (Bush.,) 273.

2. The holder of a note has no right to make an alteration to correct a mistake, unless to make the instrument conform to what all the parties to it agreed or intended it should have been, but this much he can do without destroying the legal efficacy of the writing: *Ibid.*

#### APPEAL.

Where a judgment has been taken against a defendant by default, on a complaint which does not state facts sufficient to constitute a cause of action, he may appeal to the Supreme Court, assigning the insufficiency of the complaint as error without having made a motion for relief below: *Strader et al. vs. Manville*, 33 Ind., 111.

#### ARBITRATION.

An executor or administrator has no power to submit a claim against an estate to arbitration so as to bind the estate, and if he undertakes to do so, a judgment rendered on the award will be void: *Clark et al. vs. Hogle et al.*, 52 Illinois, 427.

See AWARD.

#### ASSAULT AND BATTERY.

1. It is not essential to the right to maintain an action for an assault and battery, that the plaintiff should have been guilty of no provocation. It is immaterial what language he may have used toward the defendant, so far as the right to maintain an action is concerned: *Ogden vs. Cluycomb*, 52 Illinois, 365.

2. And even if the plaintiff went beyond words and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defense: *Ibid*, 365.

3. It is not a bar to an action for damages for an assault and battery, that the plaintiff and defendant fought with each other by agreement or mutual consent, and the injury complained of was inflicted in sudden heat arising in such fight without previous malice, but such agreement or consent may be shown in mitigation of damages: *Adams vs. Waggoner*, 33 Ind., 531.

#### ASSIGNMENT.

1. An assignment of a certificate of deposit issued within the Confederate lines, if made within the Federal lines, is a new contract

and is valid, if for a valuable consideration: *Morison et al. vs. Lovel*, 4 West Va., 346.

2. The assignee of a promissory note overdue, takes it subject to all the equities subsisting between the maker and the payee, but free from all equities subsisting between the maker and any intermediate holder: *Haywood vs. Stearns*, 39 Cal., 58.

3. If a written lease contains obligations other than for the payment of money or property for the rent of the leased premises, then such writing is not assignable by the landlord so as to vest a right of action in the assignee alone: *Helburn vs. Mofford*, 7 Kentucky, (Bush.,) 169.

4. The assignee of several notes on the same obligor must proceed on each note in proper time. When such notes mature at different dates, the assignee must use proper diligence to collect each note, or else he can not recover against the assignor on his liability implied by his assignment of the note: *Colman's Executor vs. Tully's Administrator*, 7 Ky., (Bush.,) 72.

5. No effectual assignment of a sum that may be recovered in an action of trespass for a personal assault can be made before final judgment: *McGlinchy vs. Hull*, 58 Maine, 152.

See MORTGAGE, 9.

#### ASSUMPSIT.

1. When an action of assumpsit has been tried upon the merits, the Supreme Court will not entertain an objection that the form of action was general instead of special, where it is apparent that the judgment, if affirmed, will be a protection to the party in reference to the matter absolutely litigated, unless the objection is raised in the County Court: *Lamphere vs. Cowen*, 42 Vt., 175.

2. The general proposition that there can be no contribution among wrong-doers, is subject to the exception that where one party induces another to do an act which is not legally supportable, and yet is not clearly, in itself, a breach of law, the party so inducing shall be answerable to the other for the consequences: *Spalding vs. Administrator of Oakes*, 42 Vt., 343.

3. While the general rule may be, that assumpsit will not lie for the value of property which has been bailed, unless it has been sold and converted into money, or money's worth, yet where the bailee fails to return the property, and agrees to pay for it, the bailment is

converted into a sale, and assumpsit will lie as in case of any other sale of goods: *Parker vs. Tiffany*, 52 Illinois, 286.

4. If the parties to an illegal contract are not in *pari delicto*, the party which has been taken advantage of by the one receiving the money, may recover it back in an action for money had and received: *Concord vs. Delaney*, 58 Maine, 309.

5. Assumpsit will not lie by a resident owner to recover from his town money paid under protest to redeem land sold for taxes raised for a legal purpose but assessed in an irregular or defective manner: *Rogers vs. Greenbush*, 58 Maine, 390.

6. By accepting a deed of real estate, subject to all the grantor's liabilities to the assignee of the grantor's lessee, the grant assumes the performance of the condition, from which the law will imply a promise on which an action of assumpsit will lie: *Rising Sun Lodge of Masons vs. Buck*, 58 Maine, 426.

See ACTION, 13, 15.

#### ATTACHMENT.

1. Should a mortgagor and mortgagee of chattels collude to make use of the mortgage for the purpose, by an unfair sale, of hindering, delaying and defrauding creditors of the former, by preventing anything being saved at the sale after payment of the mortgage, it might be plausibly argued that the property would be liable to attachment under the amendatory attachment act of 1865: *Laflin et al. vs. The Central Publishing House et al.*, 52 Illinois, 432.

2. The personal representatives of a deceased debtor are not, as such, the debtors of the creditors of their testator or intestate, within the sense of the statute. They are not liable in debt, but in detinue only. The personal estate is in their hands to be administered according to law, and is not therefore the subject of garnishment by the creditors of the estate of the decedent: *Parker et al. vs. Donally et al.*, 4 West Va., 648.

3. In a suit against a partnership, under the statutes and practice of this State, valid service of the writ against absent partners can not be made by the attachment of personal property of a partnership, while one or more of the partners are present, nor can the property be held by such attachment: *Remington vs. The Howard Express Co.*, 8 R. I., 406.

4. A failure of an attaching creditor to state that his demand is

just, is an irregularity which warrants a reversal: *Bailey vs. Beadle et al.*, 7 Ky., (Bush.,) 382.

#### ATTORNEY AND CLIENT.

1. It is not essential to the right of recovery by an attorney against his client for professional services, that there should be shown an express request, but if the services were rendered under such circumstances as will reasonably imply that they were performed with the assent and upon the request of such party, a recovery therefor may be had: *Cooper & Moss vs. Hamilton*, 52 Ill., 119.

2. Whatever the true rule may be in regard to the question, to what extent, for what purposes, and under what circumstances, a party for whom an appearance to a suit has been entered, can deny the authority of the attorney and ask relief from the court, the claim to do so is viewed with great disfavor by courts whenever innocent third parties have acquired rights under the judgment or decree: *Kenyon vs. Schreck et al.*, 52 Illinois, 382.

3. The payment of a judgment or decree to an attorney of record, who obtained it, before his authority is revoked and due notice of such revocation given to the defendant, is valid and binding on the plaintiff so far as the defendant is concerned. But it must be a payment of money, or if not a payment of money it must be accepted by the plaintiff in lieu of money, or the attorney must have authority to receive it: *Harper, Administrator, vs. Hurvey et al.*, 4 West Virginia, 539.

4. The payment of Confederate notes made to the attorney, without the authority of the plaintiff to receive them, was not a payment in money that would satisfy a judgment or decree against the defendant: *Ibid.*

5. The relation of attorney and client ceased or was suspended, when the former went into the lines of the Confederate States, and no payment to him would be good: *Ibid.*

See CHAMPERTY, 4.

#### AUCTIONEER.

1. The memorandum of the auctioneer, of the sale of a lot, signed with the name of the purchaser with his authority, and in his presence, was a sufficient memorial of the contract to exempt it from the statute of frauds: *Gill vs. Hewett*, 7 Ky., (Bush.,) 10.

2. The auctioneer is regarded as the agent of both the seller and purchaser of either real or personal property sold by him, and if on making the sale he signs for them a memorandum of the sale, such memorandum will be a sufficient written memorial of the contract to bind the purchaser: *Ibid.*

AUTHORITY.—See AGENCY, 1; ATTORNEY AND CLIENT, 2, 3.

#### AWARD.

When arbitrators are constituted by the parties the judges of the law, the facts, and the equity of a case, their award will not be annulled if it appear that it is within the terms of the submission, fairly construed, and furnishes a rule sufficiently certain to define and limit the rights of the parties, and under which those rights may be enforced, no mistake of law or of any material fact appearing on the face of the award, or by admission of the arbitrators nor any partiality or corrupt conduct on their part, or misbehavior in the parties, being pretended: *Harris vs. Social Manufacturing Co.*, 8 Rhode Island, 133.

BAILMENT.—See ASSUMPSIT, 3.

#### BANKRUPTCY.

1. After the discharge in bankruptcy of a principal in an attachment bond, no judgment can be rendered against him; and as no judgment can be rendered against him, the sureties in the bond are released from liability thereon by his discharge: *Payne vs. Able*, 7 Ky., (Bush.,) 344.

2. The discharge of one partner does not release another from the indebtedness of the firm: *Ibid.*

3. The mere omission of the name of a creditor, in the schedule of creditors, is not by the statute a substantive ground for preventing, or avoiding the discharge of the bankrupt: *Ibid.*

4. To avoid the discharge, it must be shown that the bankrupt omitted the name of the creditor willfully and fraudulently, and that, contrary to his oath, he did know or believe he was a creditor, and that he willfully and designedly omitted his name: *Ibid.*

#### BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. If a bill is drawn for the accommodation of the drawer or acceptor, and indorsed by the payee and subsequent indorsers, if the holder intends to hold any or all of said parties responsible to him,



as many as he intends to make responsible are entitled to notice of the dishonor of the paper, because the indorser who pays it has a right to hold the prior parties on the bill responsible to him, and he should be notified so that he may take the necessary steps to secure himself: *Todd vs. Edwards*, 7 Ky., (Bush.,) 89.

2. The acceptance of a draft from the factor by the consignor, which was protested, and returned without laches on the part of the consignor, did not extinguish the pre-existing liability of the factor: *Cartwell et al. vs. Allard*, 7 Ky., (Bush.,) 482.

3. Where the obligor of a bond, for the conveyance of certain land to the obligee, upon the latter's payment of certain notes, at maturity, conveys away the land, upon the failure of the obligee to pay the notes according to their tenor, the administrator of the estate of the obligor can not enforce payment of them: *Little vs. Thurston*, 58 Me., 86.

4. When no place of payment is named in a promissory note, it must be construed according to the law of the place where it is made: *Stickney vs. Jordan*, 58 Me., 106.

5. If the payee of a negotiable promissory note, by his indorsement thereof, "without recourse," impliedly warrants that it was given for a valuable consideration, such liability accrues when the indorsement is made, and the statute of limitations then begins to run: *Blethen vs. Lovering*, 58 Me., 437.

### BOND.

The defendant, by a sealed obligation in the ordinary form of a bond, acknowledged himself bound and obliged unto the plaintiff, in the sum of five hundred dollars, conditioned that, in part consideration of the sale by the defendant of his fish market and fixtures and stock to the plaintiff, he will not engage in the retail sale of fish, within the city of Biddeford, so long as the plaintiff shall remain in the business.

*Held:* (1) That by engaging in the retail sale of oysters within the time and place mentioned, was a breach of the contract.

(2.) That the sum of five hundred dollars constituted a penalty, and not liquidated damages: *Caswell vs. Johnson*, 58 Me., 164.

### BREACH.

1. Where the condition of a bond provides for a single act to be

done, the breach is well assigned in a declaration if it be in the words of the condition, or words which import the same thing. But where the condition of the bond requires many things, the omission of any one of which would constitute a breach, a particular breach should be specified in the assignment: *Commonwealth, &c., vs. Fry et al.*, 4 West Va., 721.

2. In an action on a sheriff's bond, for failure to levy an attachment in a suit, the declaration must aver directly that a judgment was obtained in the suit, and the amount thereof; also, that the property on which the sheriff was required to levy, was of some value, and that by reason of the failure to make a levy, the plaintiff sustains damages: *Ibid.*

See EVIDENCE, 9; EXECUTORS, ETC., 3; PARTIES, 1.

#### CARRIER.

1. In an action against common carriers, by owners of merchandise, for injury to the goods, a written instrument, in form of a bill of lading, but without signature, delivered to plaintiffs by the agent of the defendants, at the port of delivery, along with the goods, dated at the port of shipment, is admissible in evidence as a memorandum accompanying the freight, and competent evidence to be submitted to the jury on the question whether the goods were in good order and condition at the time of shipment.

An indorsement on such instrument by the agents of boats and railroads, made at the request of the plaintiffs at the port of shipment, nearly eighteen months after the delivery of the goods, stating that the instrument referred to is a copy of the manifest of a certain boat at a time stated, the boat being the same named in the memorandum, and upon which the goods were carried, and the time being the same at which the goods were received by the defendants, does not show that the paper was not the original memorandum accompanying the goods: *Weide et al. vs. Davidson et al.*, 15 Minn., 327.

2. Where a railroad company is employed by a person to transport his baggage for hire from A. to B., stations on said road, and does not deliver the goods to him at B., but carries them to C., another station on said road, and there stores them in the company's depot baggage room, the liability of the company as a common carrier is not thereby ended, and if the goods are stolen from the company at C., and lost to the owner, the company will be liable to

him for the damage sustained by him by reason of the failure to deliver the goods at B.: *The Toledo Railroad vs. Hammond*, 33 Ind., 379.

3. When a passenger enters a railway train and pays the regular fare to be transported from one particular station to another, his contract does not obligate the corporation to furnish him with safe egress and ingress at any intermediate station. And if such train turns upon a side track at an intermediate station, and awaits the crossing of another train out of time, and the passenger not destined to that station, without objection made or notice given, leaves the car, he thereby does no illegal act, but for the time surrenders his place as a passenger, and takes upon himself the direction and responsibility of his own motions during his absence: *State vs. The Grand Trunk Railway of Canada*, 58 Me., 176.

4. Where the owner of a carriage shipped the same by a common carrier, the amount to be charged for the transportation being first agreed upon, and, upon the carriage reaching its destination, was demanded by the owner, he offering to pay the charges as agreed, but the agent of the carrier refused to deliver it except upon the payment of a larger amount. *Held*: This was a conversion of the property by the carrier, and the owner could maintain trover therefor. The latter discharged his duty by making a demand for the carriage immediately on its arrival, and offering to pay the freight agreed upon: *Northern Trans. Co. of Ohio vs. Sellick*, 52 Ill., 249.

5. Where a common carrier became liable to the owner of goods for damages, which he sustained by fault of the carrier in their transportation, to an amount larger than the carrier's charge for freight, and the carrier refused to deliver them, upon being demanded, until the freight charge was paid, it was *held*: that as the carrier's lien was only co-extensive with the right to claim and recover freight, his detention was unlawful, and the owner could maintain replevin therefor: *Dyer vs. Grand Trunk R. R. Co.*, 42 Vt., 441.

6. Where a common carrier receives goods to transport and deliver at a point to a person named, and immediately upon their arrival delivers them to another person, and they are thereby lost, the carrier is liable as such, if liable at all, and not as warehouseman: *Winslow et al. vs. Vt. & Mass. R. R. Co.*, 42 Vt., 700.

7. All classes of common carriers are responsible, and equally responsible, for a loss of goods by delivery of them to the wrong per-

son, and it is no defense to their liability, that they delivered them in the customary manner, and in the usual course of business: *Ibid.*

See LIEN, 3, 4; EXPRESS COMPANIES.

#### CHAMPERTY.

1. The rescission of a champertous sale of land during the pendency of an action for its recovery, prosecuted by the champertous vendor for the benefit of his vendee, will not relate back to the commencement of the action, nor will such a rescission prevent the statute from interposing a bar to the action: *Harman vs. Brewster*, 7 Ky., (Bush.,) 355.

2. If the champertous contract for the sale of the land held adversely had been in good faith rescinded before the commencement of the action for the recovery of the land, then the statute would not have interposed a bar to the action: *Ibid.*

3. Champerty is an offense against the law, whether regard be had to the ancient common law, the English statutes upon the subject, or to the legislative acts of Rhode Island; and therefore avoids every contract into which it enters: *Martin vs. Clarke et al.*, 8 R. I., 389.

4. A contract between an attorney and counsellor at law and a client, that the attorney shall prosecute the claim at his own cost and charge, for a part of the subject in litigation, is champertous, illegal and void: *Ibid.*

CHARTER.—See FORFEITURES, 1.

#### COLLATERAL SECURITY.

Where a creditor has obtained a judgment which is collectable on a note held by him as collateral security, he will not be thereby prevented from availing himself, to the extent of his entire claim, of another note held by him as collateral security for the same claim: *Smith vs. Hunter*, 33 Ind., 106.

COLLUSION.—See ATTACHMENT, 1.

COLOR OF TITLE.—See LIMITATIONS, 4.

COMPENSATION.—See AGENCY, 1.

CONDITION.—See BREACH, 1.

CONFESSION.—See AGENT, 2.

CONSIDERATION.

Where a party gave to a constable his written obligation to pay a sum of money, the sole consideration for which was the forbearance on the part of the officer from levying a writ of attachment on the property of a third person, and the evidence showed there was no intention on the part of the officer to make the levy, the property being exempt from execution. *Held*, that the contract was void for want of consideration: *Hennessey vs. Hill*, 52 Illinois, 281.

See PRINCIPAL AND SURETY, 1; PURCHASER, 2; DEED, 6; CONTRACT, 12, 14; FRAUDULENT CONVEYANCE, 2.

CONSTRUCTION.—See CONTRACT, 6.

CONTRACT.

1. When an executory agreement between the parties is the consideration of a contract which forms the basis of an action between them, such executory agreement must be pleaded, and performance averred, and allegations are material and traversable: *Becker vs. Sweetser*, 15 Minn., 427.

2. When in an action on the contract the answer denies the contract as alleged in the complaint, except as afterwards admitted in the answer, and sets up a contract materially and substantially different from, and which would not, under the pleadings, support the contract stated in the complaint, a substantial issue is formed upon the terms of the contract: *Ibid*.

3. Parol evidence is not admissible to show that at the time when a written agreement was entered into, it was verbally agreed that the party signing the same might revoke such written agreement by notifying the other party of such revocation: *Wemple vs. Knopf*, 15 Minn., 440.

4. In an action to recover the price of goods sold and delivered, when the defendant in his answer denies the sale of the goods and avers that the transaction was a contract of agency, and it appears that the alleged purchase and directions for shipment of the goods were made by letters from the defendant to the plaintiffs, the letters are, in the first instance, the only competent evidence of the sale, and oral evidence is incompetent to establish the fact: *Steel et al. vs. Etheridge*, 15 Minn., 501.

5. In an action growing out of an agreement made by letters to and from the respective parties residing at a distance from each other,

it is the duty of the court to construe those letters and determine whether they constitute a contract: *Ellis vs. Crawford*, 39 Cal., 523.

6. In such a case it is the province of the jury to determine whether the letters were written and received by the respective parties, and the terms of the contract therein contained complied with, and of the Court to determine the construction and the legal effect of such contract: *Ibid.*

6. The good will of a business may be valuable and form the subject matter, in whole or in part, of a contract of sale: *Cruess vs. Fessler*, 39 Cal., 336.

7. A misrepresentation of the value of a business and good will knowingly made by the vendor--the purchaser being ignorant of the true value—is fraudulent, and entitles the purchaser to a rescission of the whole contract, when it is an entire contract and the fraud affects a material part of the consideration: *Ibid.*

8. A party to a contract can not have it rescinded, without a previous offer to refund the money received on account of the contract: *Morrison vs. Lods*, 39 Cal., 381.

9. A false representation by a party to a contract, will not entitle the other party to rescind or avoid the contract, unless he shows, in addition, that he would be damaged by its performance: *Ibid.*

10. A sale of personal property without delivery or possession passes the absolute title as between the parties: *Buffington vs. Ulen*, 7 Ky., (Bush.,) 231.

11. In consideration of money loaned to pay for a mare, it was agreed that unless within twelve months the money thus loaned should be refunded, the mare should be the property of the lender, to be delivered to him on demand. At the expiration of the twelve months, the money not being refunded, the mare was the absolute property of the lender: *Ibid.*

12. A grantee agreed that two notes held by a third party were a charge on the lot conveyed to him, and verbally promised to pay the two notes, in consideration of the conveyance of the lot without any lien reserved in the deed. *Held*, that the promise to pay the notes, was founded on a valuable consideration to get the lien removed, and conveyance of the lot and the notes became his own debts, and he could not avail himself of the statute of frauds, and that the promise took it out of the statute of limitations: *Hodgkins vs. Jackson*, 7 Ky., (Bush.,) 342.

13. Where the payee of a promissory note, payable on time, without interest, upon being asked by the maker if he would accept partial pre-payments, and allow interest on them, replied—I think it will be all right, there will be no trouble about it—the maker might thereby understand the payee as assenting to the allowance of interest: *Parker vs. Moody*, 58 Maine, 70.

14. A writing acknowledging that the subscriber had received the promissory note of another, for five shares of stock in the M. T. Co., and certificates of stock are to issue to the maker of the note for the same, when ready for issue—is not a contract for the future sale of the shares, but a recognition that the shares themselves were the consideration of the note: *Hope I. Works vs. Holden*, 58 Maine, 146.

15. One contract is rescinded by another between the same parties, when the latter is inconsistent with and renders impossible the performance of the former: *Paul vs. Meservly*, 58 Maine, 419.

16. A. contracted to saw into lumber for B., at a stipulated price per hundred feet, to be paid at certain periods, a certain number of logs to be furnished by B. at A's. saw-mill.

*Held*, in a suit by A. against B. for the failure of the latter to deliver a portion of the logs as agreed, that the fact that the plaintiff sold his saw-mill after he had been notified by the defendant that the latter would pay for no more sawing and deliver no more logs, or that the plaintiff made a sub-contract with a third person to saw the logs that might be delivered, could not affect the right of recovery or the measure of damages: *Dunn et al. vs. Johnson*, 33 Ind., 54.

17. On the breach of such an executory contract without sufficient cause, the measure of damages is the difference between the contract price of the entire work to be done and the reasonable cost of the work, at the ordinary prices, in labor, in wear and tear of machinery, in time of use of machinery and in value of superintendence. The profits which have been realized by a sub-contract made with a third person to do the work, or which might have been realized by such a sub-contract if made, can not be taken as evidence of such damages. This rule applies alike to public and private contracts on a large or small scale: *Ibid*.

18. One of two partners in the business of brewers, executed an agreement for the sale of "his whole interest in the brewery at, &c.," consisting of stock on hand, personal property, real estate, &c., describing certain town lots, "for the sum of," &c.



*Held*, that said agreement taken according to its terms, did not dispose of moneys on hand, or on deposit belonging to the partnership, or of bills receivable or accounts in favor of the firm: *Garnier vs. Gebhard et al.*, 33 Ind., 225.

19. A promise or agreement by a creditor, to accept of, or assent to, the provisions of a deed of assignment already made and executed by his debtor, avails nothing, when by the terms of the deed, a discharge is required to be delivered to the assignee: *Rose vs. Daniels*, 8 R. I., 381.

20. An agreement by a creditor, that upon receiving less than its full amount, his claims shall be discharged, is void unless supported by a consideration, either a release or an accord and satisfaction being needful to discharge a debt: *Ibid.*

21. An article of agreement, purporting to be made between two parties, imposing mutual obligations upon them, showing upon its face it was to be executed by both parties before it would be binding on either, but only executed by one of them, can not be given as evidence to the jury for any purpose, not even against the party executing it: *Waggeman vs. Bracken*, 52 Ill., 468.

Such a paper could have no other effect than that of a mere memorandum, which could be used by the witness to refresh his memory: *Ibid*, 468.

22. Where a party makes a proposition to another in regard to building a house for the latter, the mere fact that the former commences the work with the assent of the latter, is not conclusive evidence of a special contract in respect thereto. The work may have been commenced under a *quantum meruit*: *Ibid*, 468.

23. The plaintiff having agreed to furnish the defendants with lumber as they should want it, for the building of a mill, and having fulfilled the agreement, except that he failed to furnish it as fast as it was needed, in consequence of which the defendants suffered damages, it was *held*, that under the circumstances of this case, in order to charge the plaintiff with damage for the delay, the auditor should have found affirmatively that the plaintiff neglected to furnish lumber within a reasonable time after he was furnished with the necessary description of the lumber required: *Field vs. Black et al.*, 42 Vt., 517. See SPECIFIC PERFORMANCE, 1, 2, 3; ASSIGNMENT, 1; CORPORATIONS, 5.

CONTRIBUTION.—See TENANTS IN COMMON, 1, 2, 3; ASSUMPSIT, 2.

CONVERSION.—See CARRIERS, 4; LIMITATIONS, 8; INFANCY, 2.

### CONVEYANCES.

In an action brought against the grantee, to set aside a conveyance made by a deceased debtor, on the ground that it was made to hinder and delay creditors, to which the representative of the deceased debtor was not a party, it is error to render a judgment declaring a trust against the grantee and in favor of the estate of the grantor: *Bachman vs. Sepulveda*, 39 Cal., 688.

### CORPORATIONS.

1. The general rule is, that an action against trustees of a corporation, for a misappropriation of its funds, must be brought in the name of the corporation: *Cogswell vs. Bull*, 39 Cal., 320.

2. When the corporation on a proper demand from a stockholder, refuses to institute action, the stockholders may sue in their own name: *Ibid.*

3. Stockholders are not the sureties of a corporation, but principal debtors: *Young vs. Rosenbaum*, 39 Cal., 646.

4. The liability of the stockholders for a subsisting debt against the corporation is primary, and not conditional or contingent, and is unaffected by a suspension of the remedy against the corporation: *Ibid.*

5. A corporation can make no valid contract except such as relates to the business and objects of the corporation, and all such contracts must be made either by the board of directors or by a duly authorized agent or attorney.

An individual officer of a corporation can not by his acts, bind the corporation, unless such acts are authorized or approved by the corporation: *The Brooklyn R. R. Co., vs. Slaughter*, 33 Ind., 185.

COUPONS.—See NEGOTIABLE INSTRUMENTS, 1, 2.

COVENANT OF INDEMNITY.—See MORTGAGES, 5; RESCISSION, 4.

COVENANT TO CONVEY.—See RESCISSION, 1.

### COVENANT OF WARRANTY.

1. Without an eviction there is no breach of the covenant; but it is not necessary that the eviction should be by process of law, consequent on a judgement: *McGary vs. Hastings*, 39 Cal., 360.

2. The covenant is broken whenever there has been an involun-

tary loss of possession by reason of the hostile assertion of an irresistible paramount title: *Ibid.*

3. An actual dispossession of the grantee is not required to constitute such an action as will amount to a breach of the covenant: *Ibid.*

4. The rule of damages where there has been an actual loss of the premises, is the purchase money and interest. Where the plaintiff has purchased the paramount title, it is the sum actually and in good faith paid for the paramount title and the amount expended in defending his possession, provided such damages shall in no case, exceed the purchase money and interest: *Ibid.*

CREDITORS.—See FEME COVERT, 2; FRAUD, 7.

#### DAMAGES.

1. In an action by a passenger against a railroad company for damages for unlawfully expelling him from the train, in the absence of proof of malice on the part of the defendant, the rule of damages as given by the court to the jury, which embraced only such damages as are in themselves compensatory, and are alleged in the complaint, or the necessary consequence of the act complained of, is correct: *Du Laurans vs. St. Paul & Pacific R. R.*, 15 Minn., 49.

2. Where, after part performance of a contract for the conveyance of real estate, by the vendee, the improvements made by him being contemplated by the contract, the vendor by his own wrongful acts puts it out of the power of the vendee to fully comply with the provisions of the contract, the measure of damages in an action by the vendee against the vendor, for such breach, is the difference between the unpaid purchase money and the actual value of the lands at the time of the breach: *Case vs. Walcot*, 33 Ind., 5.

3. Where one forcibly took possession of certain wheat as it stood in the field, driving the owner away, and harvested and sold it; *Held*: In an action for such taking and conversion, that the value of the wheat at the time of the sale, in the form sold, was the measure of damages, if the plaintiff was content therewith, though he was entitled to the highest price of the property, at any time between the taking and sale, and the defendant could not set up the value of his labor in the harvesting to reduce the damages: *Ellis vs. Wire*, 33 Ind., 127.

4. In an action against a town for an injury to a stage coach,

caused solely by a defect in the highway, the loss of the use of the coach for a reasonable time, while it is being repaired, is not an element of damage: *McLaughlin vs. Bangor*, 58 Me., 398.

5. In actions for the recovery of personal property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest from the time such value was estimated: *Page vs. Fowler*, 39 Cal., 412.

6. Interest by way of damages is recoverable upon the overdue coupons of interest warrants of railroad bonds, from the time of demand and refusal of payment: *Whitaker vs. Hartford, Prov. & Fishkill R. R. Co.*, 8 R. I., 47.

7. In ascertaining the damages caused by opening a street, the jury may properly consider the benefit derived by the claimant from that portion of the street adjoining his land, as platted, which is not included in the new street, as located, and which may be subsequently abandoned as a highway: *Tingley et al. vs. City of Providence*, 8 R. I., 493.

8. In actions on contracts, actual or compensatory damages only are recoverable: *Hayes vs. Mayniham*, 52 Ill., 423.

9. In suit to recover damages for a breach of warranty, the plaintiff is entitled to recover for all damages which are the natural and proximate result of the failure of the warranty. And where a manufacturer has broken his warranty, in the construction and sale of two steam boilers, the necessary expense of repairing them, the loss of time while so engaged, as well as the increased quantity of fuel necessarily consumed to generate steam, would be considered as both natural and proximate damages: *Phelan vs. Andrews et al.*, 52 Ill., 487.

10. In actions against a city to recover damages for injuries occasioned by neglect of the officers or employees to keep the streets or sidewalks in proper repair, compensatory damages only should be given. Vindictive or punitive damages can not be recovered against a municipal corporation: *City of Chicago vs. Langlass*, 52 Ill., 256.

See ACTION, 17; ASSAULT AND BATTERY, 3; BREACH, 2; CARRIER, 2; CONTRACT, 16, 17, 23; COVENANT OF WARRANTY, 4; INSURANCE, 6; EVIDENCE, 8.

## DEBT.

An action of debt will not lie on a sealed instrument, wherein is contained no promise to pay any sum of money under any terms or conditions, but a bill of sale of certain tools used in and about the boot and shoe business, together with the vendor's good will, and an agreement not to carry on the boot and shoe business in the city of Portland, for one year from the date thereof: *Mitchel vs. McNabb*, 58 Me., 506.

## DECEDENT'S ESTATE.

1. An administrator delayed some ten years in settling an estate, using the money of the trust in his own private speculations, and upon a reference of his accounts to a master, it did not appear that there was any reason for any unusual delay in the settlement, and the administrator refused to account to the master for the result of said speculations. The master in making his report charged interest, after the first year from the granting of the administration, on balances in the hands of the administrator.

*Held*: That there was no error of which the administrator could avail himself, though the master should have charged compound interest, making annual rests in the accounts for that purpose: *Johnson's Administrators vs. Hedrick et al.*, 33 Ind., 129.

2. A decedent's estate is chargeable with the reasonable expenses of the executor, in an unsuccessful effort made by him, in good faith, to resist a contest of the will of the decedent: *Bratney Adm'r vs. Curry Exec'r*, 33 Ind., 399.

## DECEIT.

1. The complaint alleged a breach of warranty and a deceit in the sale of a horse, the defendants did not demur. Upon such a complaint the jury might find for the plaintiff, though they believed the defendants acted in good faith; hence an instruction to find for the plaintiff, if the defendants falsely represented and warranted the horse to be sound and free from disease, and the plaintiff relied thereon, and the horse was not sound but had a disease, which rendered it worthless, is not objectionable: *Johnson vs. Wallower*, 15 Minn., 472.

2. A part owner in a horse, who stands by and hears the other part owners represent it, to one to whom they are trying to sell it, to

be sound, and remains silent, is as much a party to such representation as if he had made them: *Ib.*

DECREE.—See MORTGAGE, 1.

### DEED.

1. When a line described in a deed as running from a given point, is soon afterwards located and marked upon the earth by the parties, and the line thus established is recognized and treated by them as the true line, it is conclusive upon the parties and their assigns, although it be subsequently ascertained that it varies from the one given in the deed: *Knowls vs. Toothaker*, 58 Maine, 172.

2. If a deed of real estate describes one of the lines as ending at a point on one side of a street, opposite a point on the other side, a straight line between the two points must cross the street at a right angle, and parol evidence is not admissible to show that a line ending at a different point was intended: *Bradley vs. Wilson*, 58 Me., 357.

3. An instrument which is not *prima facie* valid, but which shows on its face its own invalidity, can not constitute the basis of an action: *Welton vs. Palmer*, 39 Cal., 456.

4. A recital in a conveyance by the Trustees of a town that it was made in obedience to a judgment of the County Court, which judgment was subsequently decided to be void, does not invalidate the deed if it contain operative words of conveyance sufficient to transfer the title: *Ryan vs. Tomlinson*, 9 Cal., 639.

5. The recitals touching the void judgment may be rejected as surplusage and the deed remain a valid operative conveyance, which can not be impeached by a stranger to the transaction, not in privity with any of the parties: *Ibid.*

6. A quit-claim conveyance from a mother to the wife of a son, though, upon its face, open to the objection of attempting to create an estate *in futuro*, will be sustained as valid, the relationship between the parties furnishing a sufficient consideration, and the intent of the instrument being, unmistakably, to convey a fee subject to a life interest in the grantor: *Wardwell vs. Bassett and wife*, 8 Rhode Island, 302.

7. A deed describing lots of land, only by numbers, on a plat, conveys no rights in land embraced in a street laid down on such plat adjoining the lots, except as the same is subject to the public easment, whether the boundaries of such lot extend to the centre of

the street, *quaere?*: *Tingley et al. vs. City of Providence*, 7 Rhode Island, 493.

8. Where a deed conveys a use for life to one with remainder to another, it is to be construed, according to the great weight of authority, as vesting the remainder immediately upon the date of the deed, unless the express words of the deed absolutely forbid such an interpretation: *Gourley vs. Woodbury et al.*, 42 Vt., 395.

9. Where the defendant, owning a mill and the lands around it, had been accustomed to use an open space for mill purposes, mainly for customers to pass to and from the mill, and finally sold the mill and appurtenances, but not the open space, it was *held*, that the grantee took no right of way over said space, the mill being otherwise accessible: *Plimpton vs. Converse*, 42 Vt., 712.

See FEME COVERT, 3; FIXTURES; FRAUD, 4.

DECLARATIONS.—See EVIDENCE, 8.

DEFEASANCE.—See MORTGAGE, 2.

DEFENSE.—See CARRIER, 7.

DELIVERY.—See CONTRACT, 10; GIFT, 3; SALES, 2, 3.

DEMURRER.—See PARTIES, 2.

#### DEPOSITION.

1. It is not necessary that the certificate of the officer annexed to a deposition should give the form of the oath administered to the deponent; it is sufficient if it simply states, "that the deponent was sworn according to law:" *Ramsay vs. Flannagan*, 33 Ind., 305.

2. The fact that a deposition contains an oral statement of a fact which can properly be proved only by record, is not a good cause for the suppression of the entire deposition containing proper proof of other material facts: *Ibid.*

#### DESCENT.

A husband and wife executed a mortgage on certain real estate to which neither had any title at the time, but afterwards the husband acquired title thereto in fee simple. Subsequently the mortgage was foreclosed on default, neither of the mortgagers appearing to the suit, and the land was sold under the decree to one not a party. Afterwards the husband died, leaving his said wife surviving.



*Held*, that the widow was entitled as such, to one-third of said real estate: *Curren et al. vs. Driver*, 33 Ind., 480.

### DILIGENCE.

As a general rule, the assignee can not recover from the assignor the amount paid for the assignment, unless due diligence is used without effect, against the debtor, but it is in no case necessary to pursue the debtor if it be clear that such pursuit would be unavailing, as if the obligor be insolvent at the time of assignment, or when the note falls due, or where the note is a forgery, or where the maker is a married woman: *Morrison et al. vs. Lovell*, 4 West Va., 346.

See ASSIGNMENT, 4.

DISCHARGE.—See BANKRUPTCY, 3, 4.

### DOWER.

Where a mortgager of real estate, in his life time, assigned his property for the benefit of his creditors, and his assignees sold the equity of redemption to the tenants making the conveyance—subject to a mortgage—to be provided for by the purchasers, a payment of the amount due on the mortgage, by the tenants, and an assignment thereof to themselves, operate as an extinguishment of the mortgage, and the mortgager's widow, if she did not join in the deed, may recover dower in the premises, notwithstanding she joined in the mortgage for the purpose of releasing her dower: *Hutch vs. Palmer*, 48 Maine, 271.

### EJECTMENT.

Where a judgment in ejectment does not specify whether the sum awarded was for damages or mesne profits, or for both, the presumption is, that the judgment was sustained by the evidence, and such judgment is a bar to a further recovery for the same cause: *McCarthy vs. Yale*, 39 Cal., 585.

### EQUITY.

1. A court of equity will not rescind a deed on the ground of an innocent misrepresentation, by mistake and in the entire absence of fraud, where the rule of *caveat emptor* applies: *Brooks vs. Hamilton*, 15 Minn., 26.

2. When it is sought in equity to have an absolute conveyance decreed a mortgage, it is only necessary to show that the deed was given to secure the payment of money and it is not necessary to allege damage in such case or any special value in the premises: *Holton vs. Meighen*, 15 Minn., 69.

EQUITIES.—See ASSIGNMENT, 2.

EQUITY OF REDEMPTION.—See MORTGAGE, 1, 3; PARTNERSHIP, 4.

#### ESCROW.

A party holding an instrument or deed as an escrow, and refuses to deliver the same, is a proper party to a bill for specific performance of the instrument, or the terms of the deed: *Davis et al. vs. Henry*, 4 West Va., 571.

#### ESTOPPEL.

1. Where a conveyance of land calls for a street as a boundary of the land conveyed, the general rule is, that if the grantor be the owner of the strip so called a street, he is estopped as against his grantee to deny that it is a street, and a right of way over the same passes to the grantee by implication of law. This implication of law rests upon the fact that the grantor has bounded, or fronted the premises conveyed upon the street: *Dawson vs. St. P. F. & M. Ins. Co.*, 15 Minn., 136.

2. An estoppel to operate as such must be pleaded: *Faris and wife vs. Dunn*, 7 Ky., (Bush.,) 276.

3. Distributees are estopped from asserting claim against the executor on account of money paid by him, with their knowledge, consent, and approbation, to persons who were believed to be, but were not, distributees under the will: *Hopson's Executor vs. Commonwealth, &c.*, 7 Ky., 644.

4. When two or more persons have suffered loss by mutual mistake, relief will not be given to a portion of the parties by shifting the entire loss upon one, unless it can be shown that he was in some degree responsible for the existence of the mistake: *Ibid.*

See MORTGAGE, 6.

EVICTION.—See COVENANT OF WARRANTY, 1, 3.

#### EVIDENCE.

1. A valid levy upon sufficient personal property of the defend-

ant in the execution is *prima facie* a satisfaction of the execution but this *prima facie* effect of the levy may be rebutted: *Bennett vs. McGrade et al.*, 15 Minn., 132.

2. When the question litigated on the trial is the partnership of the defendants, and a sale of logs to them as such, a question put to one of the plaintiffs as a witness, tending to prove a fact which, if true, would not, under the particular circumstances of the case, be inconsistent with the plaintiff's present claim, that the defendants were partners and that the sale was made to them as such, was properly excluded: *Tosey et al. vs. Hershey*, 15 Minn., 257.

3. Where a party takes an exception to a ruling admitting certain evidence offered by the adverse party, and afterwards offers the same evidence himself, the exception taken is thereby waived: *Weide et al. vs. Davidson et al.*, 15 Minn., 327.

4. On the trial of an action on a promissory note which provided for the payment of "all costs and attorney fees for collection," if the note should not be paid at maturity, the only evidence introduced was the note sued on.

*Held*, that there could be no finding for attorney's fees: *Bowser et al. vs. Palmer*, 33 Ind., 124.

5. In an action to recover for goods alledged to have been sold and delivered to the defendant, he may show under an answer of general denial, that they were sold and delivered to his wife under such circumstances as not to bind him: *Day vs. Wamsley*, 33 Indiana, 145.

6. Where the value of property real or personal comes in question, a witness who has a personal knowledge of the property, and who possesses the necessary information to enable him to form a proper estimate of its value, will be permitted to give his opinion in reference to such value: *Ferguson vs. Stafford et al.*, 33 Ind., 162.

7. On the trial of an action of replevin, a witness was permitted, over the defendant's objection, to give his opinion as to the amount of damages suffered by the plaintiff by reason of the detention of the property by the defendant, without stating any facts upon which he based such opinion.

*Held*: That this was error: *Kirkpatrick vs. Snyder et al.*, 33 Ind., 169.

8. In an action against a railroad company by an administrator, to recover damages for the death of his decedent, occasioned by the col-

lision of a locomotive and cars and a wagon in which said decedent was crossing the track, upon a public highway.

*Held:* That the declarations of a fireman employed on the locomotive at the time of the collision, made upon the arrival of said train, bearing the body of the deceased, at a station one mile from the place of the accident, the train having been stopped at the scene of the accident and the body having been placed upon it and carried to said station, that the train was running between forty and sixty miles an hour; that he could not tell any difference between the signal and collision; that the deceased was sitting with his back towards the train; that he did not think the deceased saw or heard the train, or knew there was any train in reach of him; that the deceased never moved out of his position until he was struck; that there was no signal—were not admissible in evidence as part of the *res gestae*: *Belfontaine R. R. Co. vs. Hunter Adm'r*, 33 Ind., 325.

9. An exception to the admission of evidence can not be made available where it is not shown by a bill of exceptions what the ground of objection was.

On the trial of an action for breach of the covenant against incumbrances in a warranty deed, to recover an amount which the grantee has been compelled to pay as taxes constituting a prior incumbrance, there must be proper evidence of the listing and appraisal of the property: *Robinson vs. Murphy*, 33 Ind., 482.

10. Whenever a contract is infected with usury or fraud, parol proof may be admitted to show its real character, is different from what the writing purports on its face: *Ferguson's Adm'rs vs. Smith*, 7 Ky., (Bush.,) 76.

11. A devise to one in trust for another, may be established and enforced on oral testimony: *Caldwell vs. Caldwell*, 7 Ky., (Bush.,) 515.

12. To sustain the defense, that the execution of the note sued on was procured by fraud or oppression, the onus was upon the defendants to establish the fraud or oppression alleged by them: *Thompson vs. Wharton*, 7 Ky., (Bush.,) 563.

13. The instructions to a jury were, that if fairly satisfied upon the evidence, that an instrument, purporting to be the last will and testament, was subscribed by the witnesses in the presence of the testator, so that he might have seen them sign if he chose, and that the testator had made his mark to the instrument presented to the

witnesses, to be his will, that would be sufficient proof of the execution of the will, though only one of the three witnesses swore to the facts.

*Held:* On exceptions, that the instructions were correct: *Sprague vs. Luther Exec'r, &c.*, 8 R. I., 252.

14. The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument, does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law: *Martin vs. Clarke et al.*, 8 R. I., 389.

15. Proof of the fact that a mortgagee surrendered to the mortgager the mortgage given to secure the purchase money of the chattels embraced therein, under an agreement that the property should be returned, after proving that such a mortgage had been executed, is sufficient to let in parol evidence of the contents of the mortgage, on behalf of the mortgagee, in a suit between him and a third person, concerning the title to the mortgaged property: *Huls vs. Kimbal*, 52 Ill., 391.

16. When secondary evidence is admissible to prove the contents of a mortgage, such contents may be proven by any one who can swear he knew them. The mortgagee is quite as competent as the mortgager for that purpose: *Ibid.*

17. It is sufficient to enable a witness to testify to the contents of an instrument, where he states that he saw it signed, had it in his possession more than a year, and knew its contents, without stating that he had read it: *Ibid.*

18. It is competent to prove a verbal agreement made subsequent to a written agreement, which varies the written agreement, though made on the same occasion, and before the parties separate, where the written agreement contemplates a supplementary contract, and the verbal agreement is consistent with what the written agreement contemplates might thereafter transpire between the parties to supply what the written contract expressly left open for future agreement: *Field Adm'r vs. Mann*, 42 Vt., 61.

See MEMORANDUM; ADVERSE POSSESSION, 2, 3; AFFIDAVIT, 2;  
CARRIER, 1; CONTRACT, 3, 4, 17, 21, 22; DEED, 1, 2;  
FRAUDULENT CONVEYANCE, 4; GIFT, 1.

EXCEPTIONS.—See EVIDENCE, 9.

## EXECUTORS AND ADMINISTRATORS.

1. In a suit for foreclosure, by two of three joint executors against their associate, upon a mortgage to secure payment of a promissory note payable to a testator, "with interest, payable semi-annually," which note had been outstanding upwards of eleven years since the death of the testator. *Held*: That in computing the amount due on the note, the delinquent executor be charged with interest upon the semi-annual installments of interest, since the same respectively became due, although it be not in proof that payment of such installments of interest, as distinct claims, had ever been requested from the debtor, by his co-executors: *Rathbone et al., Exec'rs, vs. Lyman*, 8 R. I., 155.

2. The legal representative of an intestate estate, is the only party who can recover money due on a policy of insurance upon the life of the intestate: *Lee vs. Chase*, 58 Me., 432.

3. An omission on the part of an administrator to include in his inventory, within the time prescribed by the statute, an amount of money deposited in a savings bank, known by him when he accepted his trust, to belong to the estate of his intestate, is a breach of his official bond: *Bourne vs. Sterenson*, 58 Me., 499.

See ARBITRATION.

EXEMPTION.—See SHERIFF, 3.

## EXPRESS COMPANIES.

An express company engaged generally and publicly in transmitting for hire, goods from place to place, receiving to its own use the entire charges for transportation, employing a messenger whose business it is to accompany the goods as they are being transmitted, to take general charge of the same, attend to their trans-shipment and to their delivery to the company's local agent at the point of destination, and establishing at different points to which its business extends, local offices at which an agent is stationed, whose duty it is to receive goods transmitted, and deliver the same to the consignee, is a common carrier, although it owns no vehicles except such as are kept at its local offices, for local purposes, and although its practice is to transmit goods by steamboats, railroads, coaches, &c., owned and controlled by other parties: *Christensen et al. vs. American Express Co.*, 15 Minn., 270.

FACTOR.—See LIEN, 1.

### FEME COVERT.

1. Even if a married woman can enter into a contract so as to be bound as a member of an association for business purposes, yet her husband can not, without authority from her, make a binding contract for her by signing her name to the articles of association: *Boyd vs. Merriell*, 52 Ill., 151.

2. A married woman held the legal title to land to place it beyond the reach of her husband's creditors, it not having been bought with her own money, and she borrowed money in her own name, giving her own notes therefor, and giving the land as security. It was *held*: that personal property purchased by the wife with a portion of the money so borrowed, would be subject to execution in favor of a creditor of the husband. The property would be regarded as having been purchased with the husband's money: *Hall vs. Sroufe*, 52 Ill., 421.

3. A *Feme Covert*, holding separate property in real estate, by deed or will, prescribing a particular mode of disposition, can not dispose of it in any other mode, although the deed or will does not negative such other mode expressly: *McClintic vs. Ocheltree*, 4 West Va., 249.

See FRAUD, 4, 5.

### FIXTURES.

A stone, split out and slightly removed and laid up for the purpose and with the intention by the owner of the farm upon which it was quarried and left, of using it in the construction of a tomb elsewhere, would not pass by a deed of the farm. It would be governed by the same principles that are applicable to timber, fence rails, and the like, that are severed from the freehold. If intended for use on the farm, they pass by a deed for the sale of it; if to be used elsewhere, they do not pass: *Noble vs. Sylvester*, 42 Vt., 146.

FORECLOSURE.—See MORTGAGE, 1, 10, 12; PARTNERSHIP, 4.

### FORFEITURES.

1. The violations of its charter on the part of a corporation, which will work a forfeiture of its franchises, must be something more than



accidental negligence, or excess of power, or mere mistake in the mode of exercising an acknowledged power; and though a single act of misfeasance, if willful, may be a ground of forfeiture, yet a specific act of non-feasance, not contrary to particular requisitions of the charter, nor committed willfully, nor producing nor tending to produce, mischievous consequences to any one, will not be: *State vs. Pautucket Turnpike Corporation*, 8 R. I., 182.

2. A tenant at will or by sufferance, who assigns his interest to another, forfeits or puts an end to his estate, and the assignee entering into possession, may, at the election of the owner of the leased premises, be treated either as a tenant or as a trespasser: *McCunn vs. Rathbone*, 8 R. I., 403.

See MORTGAGE, 1.

### FRAUD.

1. When one of two innocent parties must suffer loss by the fraudulent act of a third, he who leads such party to occasion the loss must bear it: *Poorman vs. Mills*, 39 Cal., 345.

2. An allegation of actual fraud is not sustained by proof of a mistake: *Mercier vs. Lewis*, 39 Cal., 532.

3. It is not true as a legal proposition, that a mistake is constructive fraud: *Ibid.*

4. A deed made by an infant *feme covert* can not be avoided by her on the ground of her infancy, when, to induce an innocent purchaser to make the purchase, she and her husband made oath before a notary, that to the best of their knowledge and information, she was then more than twenty-one years of age: *Schmitheimer & Wife vs. Eiseman*, 7 Ky., (Bush.,) 298.

5. Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation, for neither infants nor *femes covert* are privileged to practice frauds upon innocent persons: *Ibid.*

6. A. sold to B. a farm, valued at \$6,300, in part payment for which he took from B. certain Western lands at \$1,300, upon false and fraudulent representations of B., as to their location and value per acre. Pending the transaction, B. agreed with C. to exchange said farm for one owned by C.; and at B.'s request, A. conveyed his said farm directly to C., who took possession. Upon discovering the fraud, A. tendered to B. a conveyance of the Western lands, and demanded from him \$1,300.

*Held*: In a suit by A. demanding a rescission of the contract, so far as the Western lands were concerned, and judgement for \$1,300, that he was not entitled to such rescission: *Johnson et al. vs. Cook-erly*, 33 Ind., 151.

7. To render a sale for a valuable consideration void, for fraud as against the creditors of the vendor, the vendee must have had notice of the intended fraud: *McCormack vs. Hyalt*, 33 Ind., 546.

See EVIDENCE, 10, 12; MORTGAGE, 11; CONTRACT, 7; LIMITATIONS, 2.

### FRAUDULENT CONVEYANCE.

1. In a fraudulent conveyance of personal property, accepted by the grantees, with an assurance to the grantor that it should not affect her rights, one of the grantees having received the property so conveyed to manage for the grantor rather than upon any express agreement with the other grantees, he incurred no responsibility to them by permitting the grantor to have or dispose of any part of the estate: *Riddle vs. Lewis*, 7 Ky., 193.

2. A conveyance by a husband to his wife's father, to vest title in him for her benefit, in consideration in part of advancements made to the daughter by the father, is held to have been voluntary to the extent of such consideration: *Farmers Bank of Kentucky vs. Long*, 7 Ky., (Bush.,) 337.

3. As to subsequent creditors, a conveyance is not fraudulent merely because it was voluntary.

The validity of a voluntary conveyance depends upon the intention with which it was executed: *Place vs. Rhem*, 7 Ky., (Bush.,) 585.

4. Where a party sells out his business to another, while it is not a fraud *per se* for the vendor to be employed by the vendee as a clerk to carry on the business, it is a circumstance creating a strong presumption of fraud, and especially so when the former uses and controls the property as he did before the sale. In such a case, it requires clear and satisfactory proof, and the circumstances surrounding the transaction should clearly indicate honesty and good faith, to rebut the presumption: *Rothgerber et al. vs. Gough*, 52 Ill., 436.

5. Where, in negotiating the sale of a farm at a gross sum, the seller represents with professed knowledge, that the meadow thereon contains a greater number of acres than it does contain, not believing

such representation to be true, and the purchaser relies upon such representation in the purchase, without knowledge to the contrary, the seller is bound to make good his representation; and in a suit in Chancery, brought to foreclose a mortgage executed to secure a note given for the purchase price, can recover only what he is equitably entitled to receive: *Twitchell vs. Bridge*, 42 Vt., 68.

6. Where goods are obtained on credit by such false and fraudulent representations as would vitiate the sale as against the vendee, the vendor may reclaim them after attachment and before sale on execution, though attached by creditors on debts contracted subsequent to such fraudulent sale, and on the strength of the vendee's having a stock of goods in his store, and on no other inducement—a part of which stock were the goods obtained by said fraudulent representations: *Field, Morris & Co. vs. Stearns*, 42 Vt., 106.

7. If the purchase of the land was induced by a false and fraudulent representation as to the quantity of land, the grantee may sustain an action on the case against the grantor for the fraud: *Cabot vs. Christie*, 42 Vt., 121.

#### GARNISHEE.

No decree can be had against a party who is summoned as a garnishee in a suit in Chancery, who is not made a party to the suit, and who does not appear and answer: *Chilicothe Oil Co. vs. Hall et al.*, 4 West Va., 703.

GARNISHMENT.—See ATTACHMENT, 2.

#### GIFT.

1. To establish a gift of the note of a third person, from a husband to his wife, the evidence should be such as to satisfy the court not only that the donor said and did what is necessary to constitute a valid gift, but that it was in very deed, his intention at the time, to part with his own property in it, and bestow it upon the donee, for his independent and sole use: *Trowbridge vs. Holden*, 58 Me., 117.

2. It is essential to a gift that it goes into effect at once and completely. If it regards the future it is but a promise, and being a promise without consideration it can not be enforced, and has no legal validity: *Hogues vs. Bierne*, 4 West Va., 658.

3. A gift by deed is good between the parties if it goes into effect at once, with delivery, for the delivery of the deed answers the place

of delivery of the property, when the property is capable of delivery: *Ibid.*

4. The property given or attempted to be given was one undivided fourth part of certain choses in action. The most that the donees can be held to get under the deed is an equitable title to one undivided fourth part of the personal property mentioned in the deed, and it is not therefore with the jurisdiction of a court of law to give any remedy in the premises: *Ibid.*

#### GUARDIAN AND WARD.

1. When the law entrusts the estate of an infant to the care and protection of a guardian, the fiduciary undertakes to be vigilant, faithful, and competent. These elements of qualification imply as much knowledge of law as may be necessary for safety, this, however procured, he assumes to possess and properly exercise: *Hemphill vs. Lewis*, 7 Ky., (Bush.,) 214.

2. A second guardian sued the former guardian of his ward, to recover the estate of the ward, in his hands, and being erroneously advised that such demand was a preferred claim against such former guardian's estate, he did not sue the surety of said guardian. The debt was lost because the suit was not prosecuted in due time against the surety. The second guardian is responsible for the loss: *Ibid.*

3. It is the duty of the guardian to loan out or invest the money of his ward so as to make it yield at least legal interest, and when he does this in good faith and takes good security, it can not be regarded as a conversion: *Higgins vs. McClure*, 7 Ky., (Bush.,) 379.

HEIR.—See PARTIES, 1; PURCHASER.

#### HOMESTEAD.

To sustain the claim of the owner of land to hold the same as a homestead exempt from forced sale, his residence or dwelling must be or must have been situated thereon: *Kresin vs. Man*, 15 Minnesota, 116.

A person residing upon one parcel of land, and owning a second parcel upon which he has never dwelt, and which corners upon the first, but does not otherwise adjoin it, can not hold such second parcel exempt as a homestead: *Ibid.*

HUSBAND AND WIFE.—See FEME COVERT; FRAUD, 4.

IGNORANCE.—See GUARDIAN AND WARD, 2.

### INFANCY.

1. Where an infant has legally avoided his contract for labor, the rights of the parties thereto are precisely the same as if it had never been made. Thus, where a minor agreed to work for a manufacturing corporation six months at least, and give no less than two week's notice before leaving, but does leave before the expiration of the time, and without giving such notice, he is not liable to have the damages occasioned thereby deducted from what he would otherwise be entitled to recover for his labor: *Derocher vs. Continental Mills*, 58 Maine, 217.

2. An infant is liable in assumpsit for money stolen and for the proceeds of property stolen by him, and converted into money: *Shaw vs. Coffin*, 58 Maine, 254.

3. When an infant is sued, the time prescribed by rule of court for filing dilatory pleas, dates not from the commencement of the term of court, at which the suit is entered, but from the appointment of a guardian *ad litem*, to defend the suit: *Fall River Foundry Co. vs. Doyt*, 42 Vt., 412.

4. An infant is incapable of appearing for himself and defending his suit in court, or of appointing an attorney to appear and defend for him, and if he do so without the appointment of a guardian *ad litem*, and judgment be rendered against him, he has his remedy to vacate or reverse the judgment, whether the plaintiff knew of the infancy of the defendant or not, at the time the judgment was rendered: *Ibid.*

5. A reasonable time is allowed after the infant becomes of age *locus poenitentiae*, during which a mere acquiescence, without unequivocal acts establishing a clear intention to confirm his contract, will not operate as a confirmation: *Ibid.*

6. It does not require a precise and formal promise to constitute a binding ratification, but it must be a direct and express confirmation and substantially a promise to pay the debt or fulfill the contract. It must be made with the deliberate purpose of assuming a liability from which he knows he is discharged by law, and under no compulsion, and to the party himself or to his agent.

The mere fact that an infant does not disaffirm a contract after he is of full age is not, it would seem, of itself, a confirmation, but this fact may be made a significant circumstance if coupled with a con-

tinued possession and use of the property, or a refusal to re-deliver the same, and an assertion of ownership. It may frequently raise by implication of law, such confirmation, and a promise to pay for the property, especially if either this intention and a promise to pay must be presumed, or a fraud.

Any act of ownership after full age may have this effect, but it must be unequivocal: *Schmitheimer and Wife vs. Eisenman*, 7 Ky., (Bush.,) 410.

7. That the infant must restore before he can avoid his contract is the universal rule where he has been guilty of deceit or fraud.

The rule is different where he has been guilty of no fraud, his vendor being aware of his disability, and especially if the vendor procured the contract to be made. In such case, if the infant had wasted or destroyed the property, he might be allowed to avoid the contract without the restoration of it.

But if an infant avoids an executed contract he must restore the consideration received by him: *Ibid*.

8. Courts of equity will not decree specific performance when the contract is founded in fraud, undue advantage, mistake or gross misapprehension: *Ibid*.

#### INJUNCTION.

A judgment obtained in an ordinary action can not be annulled or modified by an order in a proceeding in equity, except for a defense arising or discovered since the judgment was rendered.

When the alledged matters of defense were substantially within the knowledge of the defendant at the time the judgment was rendered against him, the court properly dismissed his petition in equity for a modification and injunction of the judgment, on the ground that such defenses were discovered since the judgment was rendered: *McCown vs. Macklin's Executor*, 7 Ky., (Bush.,) 308.

#### INSURANCE.

1. Notice to an insurance agent who issues a policy, of facts relating to the subject matter of the insurance, is notice to the company, and if he fails to properly state them in the policy when relied on and trusted to do so, the company should not be permitted to escape liability on that ground: *Commercial Insurance Co. vs. Spankneble*, 52 Illinois, 53.

2. While it is a general rule, that, on an application for insurance, all material facts which directly tend to increase the hazard must be disclosed by the applicant, the fact that he is obnoxious to numerous persons in the vicinity of the property sought to be insured, is not within that rule, and need not be disclosed unless he is interrogated on that subject: *Keith et al. vs. Globe Insurance Company*, 52 Illinois, 518.

3. Where a member of a partnership firm applied for insurance on partnership property and in the name of the firm, and the officers of the company so understood the application, but by mistake issued the policy in the name of the individual partner alone, it was held, a court of equity would reform the policy so as to make it conform to the intention of the parties: *Keith et al. vs. Globe Insurance Co.*, 52 Illinois, 518.

4. In fire as well as marine insurances, a retrospective insurance, made when the thing insured is distant, and its status unknown to either party, will bind the insurer for a loss occurring before the date of the contract.

5. The intention to make the insurance retrospective may be implied from the circumstances under which it was made.

6. A contract to issue a policy, or an executory agreement to insure, may be binding, according to the common law, without any written memorial.

Courts of equity will not only enforce an oral contract for a policy, but having jurisdiction for specific enforcement, will to avoid unnecessary circuitry, adjudge the damages just as if a policy had been executed, and an action had been brought on it for the loss of the thing insured: *The Insurance Co. of N. Y. vs. The Kentucky M. & F. Insurance Co.*, 7 Ky., (Bush.,) 81.

INTENT.—See FRAUDULENT CONVEYANCES, 3; GIFT, 1; INSURANCE, 3, 5.

#### INTEREST.

1. The owner of a carriage shipped the same by a common carrier, the amount to be charged for transportation being first agreed upon, and upon the carriage reaching its destination, it was demanded by the owner, he offering to pay the charges as agreed upon, but the agent of the carrier refused to deliver it except upon payment of a larger amount. After the refusal to deliver, the carriage was de-



stroyed by fire. *Held*, in such case, where the owner brought trover against the carrier, the plaintiff was entitled to interest on the value of the property from the the time of the demand and refusal: *Northern Trans. Co. of Ohio vs. Sellick*, 52 Illinois, 250.

2. Where a fraudulent sale has been had under a deed of trust, and the sale set aside, interest may be properly allowed on a judgment for the debt, which accrued between the time of setting aside the fraudulent sale, and a subsequent sale under the deed: *Hopkins vs. Granger et al.*, 52 Illinois, 505.

See CONTRACT, 13; DAMAGES, 5, 6; DECEDENTS' ESTATE, 1.

### JUDGMENT.

1. When the judgment recites that all owners and claimants of property have been duly summoned to answer the complaint and have made default, the judgment in this respect, can not be impeached in a collateral action, although it appears that the name of one of the owners was omitted in the published summons: *Reily vs. Lancaster*, 39 Cal., 354.

2. Where there are several defendants and no community of interest or ownership of property is shown by them, a joint judgment in their favor is erroneous: *Page vs. Fowler*, 39 Cal., 412.

3. If the facts material to support a judgment are alleged in the complaint, or are fairly inferable by any reasonable intendment from what is alleged in the complaint, the judgment should be sustained: *Smith vs. Dennett*, 15 Minn., 81.

4. It is the fact of personal service of a summons, not the proof of the fact, which confers jurisdiction on the court to enter judgment, and judgment being rendered by a court of general jurisdiction; the presumption is in favor of its regularity, and when the return shows an admission of personal service signed by the defendant, although the proof of the service may be defective, if there is no evidence to show that the summons was not served, the judgment will not be reversed: *Skillman vs. Greenwood*, 15 Minn., 102.

See BANKRUPTCY, 1; CONVEYANCES; EJECTMENT; INFANCY, 4.

JURISDICTION.—See GIFT, 4; JUDGMENT, 4.

### LANDLORD AND TENANT.

1. A covenant by the lessor of land to build on the leased premises,

does not by implication, impose on him an obligation to rebuild in case of the destruction of the building by fire, during the tenancy: *Cowell vs. Lumly*, 39 Cal., 151.

2. The failure of the lessor to rebuild after the accidental destruction of the building by fire, does not relieve the tenant from his express agreement to pay rent: *Ibid*.

3. A party in possession under an agreement to occupy and take care of the land for six years, with the understanding that he might secure the title by purchase when he should be able, was not a tenant in the sense of the statute providing the summary remedy of forcible entry and detainer against a tenant holding beyond his term: *Reeder vs. Klette*, 7 Ky., (Bush.,) 255.

4. The statement of the tenant in possession, under an agreement to purchase that he was not holding as the mere tenant, was not a disclaimer of the allegiance of an unqualified tenant to a technical landlord: *Ibid*.

5. The surety of a tenant, in his covenant to return the property in good order, is not liable for damages for the failure of his principal to return the house and lot at the expiration of the term, when possession was not demanded, and no readiness for possession was expressed by the lessors: *Kyle vs. Proctor*, 7 Ky., (Bush.,) 493.

6. Where a lease contains no covenant on the part of the lessor to repair, he is not bound to do so, and if the lessee makes repairs, he can not charge the lessor with the cost thereof. Nor can a custom in the locality in which the premises are situated, or in the State, contrary to this rule, be set up by the lessee: *Biddle vs. Reed*, 33 Indiana, 529.

LEX LOCI CONTRACTUS.—See BILLS OF EXCHANGE, ETC., 4.

#### LIEN.

1. A person having property of another in his possession as factor, accepted a draft drawn by the owner of the property in favor of one of his creditors, the draft was made specifically payable out of the property, and it was agreed between the debtor and his creditor that the factor should retain the custody and control of the property, as their mutual agent, for the specific purpose of paying the draft. *Held*, that the effect of the transaction was to give to the factor a lien on the property to secure him against his liability as acceptor of the draft; and while the property thus remained in his possession no

purchaser from the owner or creditor, could acquire an interest in it paramount to such lien: *Eaton vs. Truesdail et al.*, 52 Ill., 307.

2. Where a debtor transfers to a creditor personal property to be sold by him, and the proceeds to be applied to the payment of his debt, and the debts of certain other creditors, with their consent, the transferee and those he represents obtain a lien upon the property and its proceeds, superior to any which other creditors could acquire by the subsequent levy of an attachment or other process thereon: *Handley vs. Pfister et al.*, 39 Cal., 283.

3. The lien of a common carrier for freight or transportation of property is lost, by the voluntary surrender of possession: *Wingard vs. Banning*, 39 Cal., 543.

4. If a common carrier sues out and procures to be levied a writ of attachment against property on which he had a lien for freight he thereby abandons and forfeits his lien: *Ibid*.

See MORTGAGES, 9; ADVERSE POSSESSION, 1.

#### LIMITATIONS.

1. Equity follows the law in the application of the statute of limitations. So, where a remedy at law, in case one existed, would not be barred, neither would the remedy in Chancery, in respect to the same contract: *Board of Supervisors Henry Co. vs. Winnebago Swamp Drain Co. et al.*, 52 Ill., 454.

2. But the fact that a statute of limitations is positive in its terms, will not, under all circumstances, operate as a bar in equity. There are cases in which a court of equity will not permit the bar of the statute to be interposed against conscience, and it will supply and administer a remedy within its jurisdiction, and enforce the right for the prevention of a fraud: *Ibid*, 299.

3. A promise by a person to pay all the notes that could be produced against him, accompanied by an averment that none could be produced, and that he owed none, does not amount to a promise to pay any particular note, or a recognition of its validity and the promise or acknowledgment, to be binding, must have special reference to the debt in controversy: *Norton vs. Colby*, 52 Ill., 198.

4. A deed of conveyance which purports to convey title, executed by a purchaser at a sale under a judgment of foreclosure of a mortgage upon the premises, will constitute color of title in the grantee, notwithstanding the judgment of foreclosure be void: *Hinkley et al. vs. Greene*, 52 Ill., 223.

5. Where a party claiming land under color of a title, conveyed the same, and on the next day he paid the taxes for the current year, which had been previously assessed against him, and which he was legally liable to pay, it was *held*, the payment would be regarded, as having been made under and subordinate to the title he had conveyed, and would enure to the benefit of his grantee: *Elston et al. vs. Kennicott et al.*, 52 Ill., 272.

6. It is not essential that the three elements of the bar of the statute, under the second section of the act, as the color of title, payment of taxes, and taking possession, should all concur through the same person; but, as in this case, one may acquire the color of title and pay the taxes for the required period and then make conveyance to another, to whom all the rights of the grantor will pass; and a third person may, under a contract of purchase from such grantee, enter into possession, and thus the bar of the statute will become complete: *Hale vs. Gladfelder et al.*, 52 Ill., 91.

7. In a case of an express trust, where there is such a confidence between the parties that no action will lie, and a court of equity alone has jurisdiction, the statute will not constitute a bar: *Clay's Adm'r vs. Clay*, 7 Ky., (Bush.,) 95.

8. When a person holding a life estate in property converts the entire estate to his own use, with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible to the remainder-men, who have a right to recover against him the full value of their estate, and the cause of action, which consists in the injury to the estate in remainder, accrues as soon as the wrong has been committed, and from that time therefore, limitation runs: *Roberts vs. Roberts*, 7 Ky., (Bush.,) 100.

9. In case of an express continuing trust the statute of limitations does not begin to run as against the *cestui que trust* and in favor of the trustee, until there has been some open express denial of the right of the former, and what amounts to an adverse possession or assertion of right on the part of the latter: *Roberts vs. Roberts*, 7 Ky., (Bush.,) 100.

10. An action upon an account concerning the trade of merchandise between merchant and merchant, is barred by five years' limitation: *Hearn's Adm'r vs. Van Ingen*, 7 Ky., (Bush.,) 426.

11. An action on a merchant's account against an ordinary customer is barred by one year's limitation: *Ibid.*

See ACTION, 18; BILLS OF EXCHANGE, ETC., 5; CHAMPERTY, 1, 2.

MASTER AND SERVANT.

In an action against a railroad company for injuries sustained by the plaintiff, while in the service of the company as brakeman, the evidence showed that the injury complained of happened while the plaintiff was in the discharge of his duties, by collision with a projecting awning from one of the station houses on defendant's line of road, whereby he was knocked off the car, and so injured as to require amputation of his left arm, and that the dangerous position of this awning was well known to the division superintendent and division engineer, whose attention had been called to it a long time prior to the accident. *Held*, that this was negligence of such a character that the company must be held liable for the damages sustained: *Illinois Central Railroad Co. vs. Welch*, 52 Ill., 183.

2. Where a person in the employment of another, in the performance of a specific line of duty only ordinarily hazardous, is commanded by a fellow servant, but to whom he is so subordinate that he is compelled to obey his directions, to do an act in the same general service, but different from the sphere of employment in which he had engaged to serve, and extra hazardous in its character, and in respect to which the servant making the requirement knew he was unskilled and inexperienced, and in doing the same the servant so directed receives injuries, occasioned by the negligence of another servant employed in the particular line of service in which the act was being done, the common employer will be liable to the servant so injured: *Lalor Adm'x vs. Chicago, Burlington & Quincy Railroad Company*, 52 Ill., 401.

MEMORANDUM.

A memorandum of a parol contract, made by one of the parties immediately after the contract was made, is not of itself, evidence, or evidence in chief, but might be a circumstance tending to confirm the party in his testimony in respect to the contract, and for this purpose was proper to be read to the jury, where the other party, the defendant, had introduced testimony tending to show that the plaintiff had testified in respect to the same transaction on a former occasion, before the grand jury, that the defendant had deceived him, and did not testify to a contract as he claimed and testified to in this suit, it appearing that the party testified before the grand jury with the

same memorandum before him: *Cross vs. Bartholomew*, 42 Vermont, 206.

See AUCTIONEER, 1, 2.

MISFEASANCE.—See FORFEITURES, 1.

MISNOMER.—See ABATEMENT, 1.

MISTAKE.—See FRAUD, 2, 3; NEGOTIABLE INSTRUMENTS, 3; ACTION, 1; ESTOPPEL, 4; ALTERATIONS, 2.

### MORTGAGE.

1. There must be a perfected decree in order to foreclose a mortgagor's equity of redemption. The right to redeem is not forfeited where a mortgagee or his assignee brings a petition to foreclose and finally goes into possession under the supposition by both parties that the decree is perfected according to the terms agreed upon between them, it not being contemplated or provided in the agreement that any rights should be lost or acquired under a decree; and the grantee of the mortgagee would be charged with notice of the right to redeem, the mortgagor having done nothing to mislead as to the title: *Smith vs. Bartholomew et al.*, 42 Vt., 356.

2. A party executed a conveyance, absolute in form, and received from the grantee a writing, in which the latter agreed, in consideration of the deed, to endeavor to sell the property conveyed within one year, and after paying a debt due from the grantor to a person who held a deed of trust on the same property, and also a debt due to the grantee himself, to re-pay to the grantor all the surplus arising from the sale and any rent received by the grantee during the year. *Held*: That this writing did not amount to a defeasance, it not being under seal, nor purporting to defeat the estate conveyed by the deed in any event. It might, perhaps, be called a declaration of trust: *Walsh vs. Brennam*, 52 Ill., 193.

3. The right of a mortgagor or his grantees, to redeem after condition broken, is a purely equitable right, the creation of courts of Chancery. It is a right which can be asserted only in a court of equity, and when its assertion would be plainly inequitable that court will withhold its aid: *Kenyon vs. Schreck*, 52 Ill., 383.

Although in a limited sense and for some purposes, a mortgagee in possession for condition broken and without foreclosure, is a trus-

tee for the mortgagor, yet he is not so in a strict sense and for all purposes, to the extent of disabling him from dealing with the mortgaged property, under any circumstances for his own benefit: *Griffin vs. Marine Co. of Chicago*, 52 Ill., 130.

4. A mortgage debt is not released, nor a mortgage discharged, by a release from the mortgagee to a purchaser of the mortgaged estate (in whose deed is contained an agreement that the grantee shall assume and pay the mortgage debt) of all claims and demands arising by virtue of that agreement: *Knowles vs. Carpenter*, 8 R. I., 548.

5. A covenant of indemnity to the purchaser and his assigns, contained in such release, does not extend to a grantee of that purchaser, he not being a party to said agreement: *Ibid.*

6. Such a release does not operate by way of estoppel for the protection of a subsequent purchaser, who takes the estate subject to the mortgage: *Ibid.*

7. A mortgage does not convey the legal title for any purpose, either before or after condition broken: *Mack vs. Wetsler*, 39 Cal., 247.

8. A mortgage is mere security for the payment of money, and passes no estate in land: *Ibid.*

9. A lien held under a mortgage will pass by a simple assignment of the debt, but will not pass by a conveyance of the land alone: *Ibid.*

10. Where satisfaction of a mortgage has been duly entered on the record, as provided by the statute, a decree of foreclosure, without at the same time setting aside satisfaction of the mortgage, is erroneous: *Russel vs. Mixer*, 39 Cal., 504.

11. The rule that absolute sales of personal property not accompanied by possession are fraudulent *per se*, does not embrace mortgages and deeds of trust merely creating an incumbrance on property to secure the payment of debts.

The mortgagee in this case permitted the mortgagor to retain the possession of the mortgaged goods, and acquiesced in the sale of the mortgaged property and the misappropriation of the proceeds. This was a badge of fraud, but under the circumstances of this case it was not such evidence of meditated fraud on the part of the mortgagor as was requisite to establish the allegation of a sale of his property with



the fraudulent intention of hindering and delaying his creditors: *Ross vs. Wilson et al.*, 7 Ky., (Bush.,) 29.

12. A mortgage which had been duly recorded was assigned by deed indorsed upon it, and describing it, as "the within described mortgage." Said deed of assignment was also recorded on a subsequent page of the record in which the mortgage was recorded, and the mortgage was not recorded with it. The mortgage was afterwards foreclosed by advertisement. *Held*, that the assignment was recorded within the provision, that if the mortgage has been assigned, all the assignments thereof must have been recorded, to entitle any party to make such foreclosure: *Curli vs. Taylor*, 15 Minn., 171.

13. As a general rule a power to sell and convey real estate, does not confer a power to mortgage; and a mortgage executed under a power of attorney, authorizing the attorney to sell and convey, is void: *Morris vs. Watson*, 15 Minn., 212.

See ACTION, 2, 16; DESCENT; EQUITY, 2; EVIDENCE, 15, 16; EXECUTORS, ETC., 1; PARTNERSHIP, 4.

MUTILATION.—See NON EST FACTUM, 2.

NEGLIGENCE.—MASTER AND SERVANT, 1.

#### NEGOTIABLE INSTRUMENTS.

1. It is settled by the current of American authorities, that a coupon bond is negotiable, and that the coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond, and this after the bond itself has been paid and satisfied as well as before: *National Exchange Bank vs. Hartford, Prov. & Fishkill R. R. Co.*, 8 R. I., 375.

2. A coupon once detached and negotiated ceases to be a mere incident of the bond, and becomes an independent claim, and its amount, with interest after demand of payment, is recoverable under a general count in debt: *Ibid.*

3. An alleged mistake and want of consideration in a negotiable note or bill will not avail the makers in a suit against them by a *bona fide* indorsee, for value, before maturity or dishonor, actual or constructive, or by any subsequent holder through such original indorsee: *Poorman vs. Mills*, 39 Cal., 345.

4. A negotiable note or bill indorsed and transferred to a *bona fide*

holder for value, without notice, by the payee thereof, before maturity or dishonor, actual or constructive, is relieved of all equities existing between the drawer or maker and the payee, and any subsequent assignee receives the same, in like manner, relieved of all such equities: *Ibid.*

### NON EST FACTUM.

1. Under the plea of *non est factum*, it is competent to prove that at the time of the delivery of the bond to the obligee, by the principal debtor, it was stated by him that the two obligors, who were in fact sureties, had signed it with the understanding and agreement that certain other parties were also to sign it. And this being established, and that the obligee took the bond with this understanding, the delivery, which is essential to the existence of the bond, was not such a one as the bond of the parties to be bound thereby, and therefore there was no such bond: *Stuart et al. vs. Livesay*, 4 West Va., 45.

2. Where the plea of *non est factum* is sought to be made out on the ground of the mutilation of the instrument, the question whether it has been mutilated, is for the jury and not the court, and it is proper to permit it to go to the jury without first requiring the plaintiff to explain the alteration apparent on its face: *Conner vs. Fleshman*, 4 West Va., 693.

NONFEASANCE.—See FORFEITURES, 1; RAILROAD.

NOTICE.—See FRAUD, 7; PURCHASER; ACTION, 18; BILLS OF EXCHANGE, ETC., 1; INFANCY, 1; INSURANCE, 1, 2.

### PARTIES.

1. Where a covenant against incumbrances contained in a deed of conveyance of real estate, is broken, and the damages for the breach accrue during the lifetime of the person holding under such covenant, his heir has no right of action on the covenant. In such case, the administrator must sue: *Frink vs. Bellis et al.*, 33 Ind., 135.

2. The question of a defect of parties' plaintiffs can not be raised by a demurrer to the complaint for failure to state sufficient facts: *Musselman vs. Kent*, 33 Ind., 452.

See ESCROW.

PAROL PROOF.—See EVIDENCE, 10, 11, 15, 16.

PAROL AGREEMENT.—See EVIDENCE, 18; MEMORANDUM; RESCISSION, 3.

### PARTNERSHIP.

1. The interest of one partner in the partnership property may be sold under an execution against him for his individual debt, and that interest, whatever it may be, will pass to the purchaser; to be held, however, subject to all the rights of the other partner, so that if, upon a settlement of the partnership affairs, the debtor partner would have been entitled to nothing had no sale taken place, then the purchaser will take nothing by his purchase: *Chandler vs. Lincoln*, 52 Ill., 74.

2. It is as much the business of one partner as another, to give his time and attention to wind up the affairs of a firm, unless the one has by contract or otherwise, assumed the exclusive duty of doing so: *Wilder vs. Morris*, 7 Ky., (Bush.,) 420.

3. Before one partner can be made responsible for all outstanding debts, it would be necessary that a direct allegation should be made of a contract by him to that effect, or the charge should be made accompanied by such a statement of facts sufficient to constitute such an assumption distinctly, so as to give the party charged an opportunity to traverse allegation: *Ibid.*

4. Certain real estate being owned by a firm composed of two partners, and used in the business of the partnership, one of them alone executed a mortgage on an undivided half of it, to secure the payment of his individual debt. Afterwards, said real estate was sold at sheriff's sale, under a judgment rendered after the execution of said mortgage, against the partners, for a debt of the firm contracted before the execution of the mortgage.

*Held:* That the mortgagee was not entitled to foreclose his mortgage, as against the purchaser at the sheriff's sale, without redeeming or offering to redeem from the sheriff's sale that part of the real estate covered by said mortgage: *Kistner vs. Sindlinger*, 33 Ind., 114.

See ADMINISTRATION, 1; ATTACHMENT, 3; BANKRUPTCY, 2.

PAYMENT.—ACTION, 7, 8, 11, 16; ADMINISTRATION, 3; ATTORNEY AND CLIENT, 4, 5; BILLS OF EXCHANGE, ETC., 3.

PENALTY.—See BOND.

PLEADING.—See CONTRACTS, 1, 2.

POLICY OF INSURANCE.—See EXECUTORS, ETC., 2.

POSSESSION.—See MORTGAGE, 11.

POWER TO SELL.—See MORTGAGE, 13.

POWERS.—See ADMINISTRATION, 4.

PRESENTMENT.—See ADMINISTRATION, 2.

### PRINCIPAL AND SURETY.

1. Where a promissory note with surety, has been given upon an agreement that the payee shall deliver up to the maker another note for the same amount theretofore executed by the same maker with other surety to the same payee, and the payee fails to so deliver up said other note, there is no consideration to support the new note: *Heeg et al. vs. Weigand et al.*, 33 Ind., 289.

2. If such new note be given to indemnify the surety on the old note, the new one becomes an additional security in the hands of the payee, and the surety for whose indemnity it has been given, having paid the debt and received said new note from the payee, may recover thereon against the new surety: *Ibid.*

PROMISE.—See LIMITATION, 3.

### PURCHASER

A subsequent purchaser, for a valuable consideration, from an heir, without notice of a prior unrecorded conveyance from the ancestor, will be protected in his title as against such prior conveyance: *Bowen vs. Prout*, 52 Ill., 354.

### RAILROAD.

The damage resulting to an individual in consequence of a railway company so constructing their road across a highway as to make it impassable at the crossing, does not constitute a claim against the company, where the facts show no positive injury, but shows a mere *non-feasance*. The liability of the company for such default is, under the statute, to the town; and the liability of towns to individuals for such insufficiency of a highway does not differ from their liability

for insufficiencies from other causes: *Buck et al vs. Conn. & Pass. River R. R. Co.*, 42 Vt., 370.

RATIFICATION.—See AGENCY, 2; INFANCY, 5, 6.

RECOVERY.—See ATTORNEY AND CLIENT, 1.

REMAINDER.—See DEED, 8.

REPAIRS.—See LANDLORD AND TENANT, 6.

REPLEVIN.—See CARRIER, 5; EVIDENCE, 7.

REPRESENTATIONS.—See FRAUDULENT CONVEYANCE, 5, 6, 7.

RELEASE.—See MORTGAGE, 4, 5, 6.

#### RES ADJUDICATA.

Where an account has been filed as a claim against a decedent's estate, and final judgment on the merits of the cause has been rendered, such judgment remaining in force, is a bar against said account as a set-off in a suit by the administrator of said estate against the claimant, upon a note executed by the latter to said decedent: *Nave vs. Wilson Adm'r*, 33 Ind., 294.

#### RESCISSION.

1. Any general covenant to convey title, if not restricted or qualified in its terms by any other stipulation, implies that the covenantor can convey a perfect legal title regularly derived from the State; and if he should be unable to convey such title, his covenant is broken: *Davis vs. Dycus*, 7 Ky., (Bush.,) 4.

2. A court of Chancery will not decree a rescission of the contract where there is no other ground for claiming its interposition than a defect of title in the vendor. The vendee has an adequate remedy in an action at law on the covenants contained in the deed: *Upshaw vs. De Bow*, 7 Ky., (Bush.,) 442.

3. If there was a verbal contract of sale, and the vendee, being put into possession, has not acquired a perfect title to the premises by limitation, the vendor may avoid such contract, and compel a rescission on equitable terms: *Richmond & Lex. Turnpike Co. vs. Rogers*, 7 Ky., (Bush.,) 532.

4. In an action of assumpsit for the proceeds of goods obtained by fraud, brought by the vendor against the assignee of the fraudu-

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EQUITY, 1;

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oods to be paid for on delivery, in order  
r damages for non-delivery, it is incumbent  
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request for payment. This is the doctrine  
ales: *Ibid.*

MORTGAGE, 11.

## SHERIFF.

1. In an action against a sheriff for default of a deputy in not paying over to the party entitled, the proceeds of a sale of property attached by the deputy, evidence that the action, in which the attachment and sale were made, was instituted by the parties to it for the purpose of enabling the defendant therein to defraud his creditors, is not admissible, as the sheriff is accountable for the default in such case: *Searer vs. Pierce*, 42 Vt., 325.

2. Where an officer takes a receipt for property attached, and afterwards gives up the receipt and takes the property into his possession, he stands in respect to it the same as though he had never taken a receipt for it: *Stimpson vs. Pierce*, 42 Vt., 334.

3. A sheriff who levies upon and sells property exempt from execution, is liable for the value of such property, if claimed as exempt prior to the sale: *Spencer vs. Long*, 39 Cal., 700.

4. A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of *certiorari* has been issued, and commanded him to stay all proceedings upon the execution, is liable for the value of the property: *Ibid.*

## SPECIFIC PERFORMANCE.

1. In a suit for specific performance, the contract must be so free from ambiguity as to leave no reasonable doubt of the intentions of the parties: *Agard vs. Valencia*, 39 Cal., 292.

2. It must be shown that the contract is fair and just, and that it would not be inequitable to enforce it: *Ibid.*

3. Where there is but one contract and one cause of action under it, there can be but one action, in which the rights of all parties can be adjusted: *Ibid.*

See ESCROW; INFANCY, 8.

## SURETY.

1. If property of value more than sufficient to pay the debt be delivered to the creditor in discharge thereof, and he afterwards permits the principal debtor to sell the property and retain the price, the surety will be discharged; for the creditor thereby contracts a new debt with his principal debtor to which the surety is no party, and he can not hold the surety bound for the former debt, because it had been satisfied: *Ruble vs. Norman*, 7 Ky., (Bush.,) 582.



2. The principal debtor in this case, delivered hogs to the creditor more than sufficient to pay the debt in payment thereof, and afterward, without the consent of the surety, he permitted the principal debtor to sell the hogs and retain a portion of the price, thereby leaving a portion of the debt unsatisfied. The surety was thereby discharged from liability: *Ibid*.

See BANKRUPTCY, 1; CORPORATIONS, 3; LANDLORD AND TENANT, 5.

TENANT-AT-WILL.—See FORFEITURES, 2.

### TENANTS IN COMMON.

1. Equity does not deny to one tenant in common, the right to purchase in an outstanding or adverse title to the common property, but it will not permit him to acquire such title solely for his own benefit, or to the absolute exclusion of the other: *Mandeville vs. Solomon*, 39 Cal., 125.

2. But the co-tenant must exercise reasonable diligence in making his election to participate in the benefit of the new acquisition: *Ibid*.

3. Unless he makes his election to participate in a reasonable time, and contribute or offer to contribute his proportion of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits: *Ibid*.

TRESPASS.—See ABATEMENT, 2.

TRUSTS.—See LIMITATIONS, 9.

UNDUE INFLUENCE.—See WILL, 3.

USURY.—See EVIDENCE, 10.

WAIVER.—See ACTION, 5; EVIDENCE, 3.

WARRANTY DEED.—See EVIDENCE, 9.

### WILL.

1. Where a testator created an equitable estate for life for one of his daughters, and provided, that in the event of her death without issue, the remainder should be equally divided between his *children*, and a particular *grandchild*, named. *Held*: That other grandchildren, whose mother was dead at the time he made his will, and who

were objects of his bounty under another clause of his will, were not entitled, by construing the word "children" to include *grandchildren* in such a case, to share in the remainder: *Tillinghast vs. De Wolf et al.*, 8 R. I., 69.

2. The law favors the vesting of estates, and when a gift is made to a person *in esse*, it passes to the legatee, as a vested interest, immediately on the death of the testator; and if there be a prior gift created, determinable on an event certain to take place, and there be a gift over upon such determination, the last gift will vest with the first and it will be held the possession and enjoyment of the gift is postponed, but not the gift itself: *Staples et al. vs. De Wolf et al.*, 8 R. I., 74.

3. Undue influence to avoid a will must be such as to overcome the free agency of the testator at the time the instrument was made: *Forney et al. vs. Ferrel et al.*, 4 West Va., 729.

If undue influence be proved to have been exercised over the testator, both before and after the execution of the will, the facts may be given in evidence to the jury, from which they may infer, if they see proper, that undue influence was exercised over the testator at the time the will was made: *Ib.*

4. It is proper to admit, as evidence, to the jury, a conversation in the presence of the testator, and other conversations of the testator, as to what he would do at the time of his decease, with the property devised by him: *Ib.*

5. The burden is on the proponent of a will to prove the due execution of it, and the capacity of the testator. Neither sound reason nor the weight of authority sustain the view, favored in some cases, that there is a legal presumption that, when a will is executed in due form, the person who executed it has the required capacity: *Williams, Ex'r., vs. Robinson*, 42 Vt., 658.

See EVIDENCE, 13.

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**RECENT AMERICAN DECISIONS.**

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**SUPREME COURT OF TENNESSEE.**

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[DECEMBER TERM, 1871.]

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**JAMES McLAUGHLIN** vs. **ROBERT CHADWELL**, *Tax Collector, &c., et al.*

McFARLAND, J.—The questions presented in these causes, are, as to the legality of the taxes assessed for State, county and municipal purposes, against the stock owned by the parties in the National Banks of Nashville.

The Act of Congress in regard to National Banks, approved June, 1864, contains the following proviso: "That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; *provided, further*, that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

By the act approved 10th February, 1868, it was enacted, "that the words, 'place where the bank is located, and not elsewhere,' used in the first named act, shall be construed and held to mean the State within which the bank is located; and the Legislature of each State may determine and direct the manner and place of taxing all the shares of National Banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such State; *and provided, always*, that the shares of any

National Bank owned by non-residents of any State, shall be taxed in the city or town where said bank is located, and not elsewhere."

The question was soon made, that as the National Banks were founded upon United States bonds or securities, which are exempted from taxation under State authority, that an attempt to tax the stock of the individual, was really taxing the bonds under another form; but, it was held by the Supreme Court of the United States, that, although the bank could not be taxed, yet the shares of the stockholders might be included in the valuation of personal property, taxable under State laws, subject to certain restrictions imposed by the 41st section of said act: See case of *Van Allen vs. Ausepors*, 3 Wallace, 573. This decision has been several times re-affirmed by the same court, and may now be considered as definitely settled: See *People vs. Commissioners*, 4 Wallace, 244; *Austin vs. The Aldermen*, 7 Wallace, 694; *National Bank vs. The Commonwealth*, 9 Wallace, 353.

So, the power of the State to impose the tax upon the shares of the stockholders as personal property, is not questioned, provided, the laws of the State imposing the tax do not violate the limitations and restrictions imposed by the Acts of Congress referred to. And whether the laws of this State under which these taxes have been assessed violates these limitations, is the question.

We will proceed then, to inquire the state of our law at the time this tax was assessed. The Code, section 541, provides, "That the following property shall be taxable, except such as is declared exempt by the next section. And in sub-sections 9 and 10, is enumerated all investments by inhabitants of this State in stocks out of the State, and "all other stocks."

By the act passed 13th of March, 1868, it was enacted that, "All interest paying State, county and corporation bonds, owned by citizens of this State, whether deposited in or out of the State, shall be taxed forty cents on the one hundred dollars for State purposes," &c. By this act a tax was imposed upon the business of banking, but this was changed by the act passed 1st March, 1869, the 9th section of which is as follows: "*Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company organized under the authority of this State, or of the United States; but the stockholders in such banks and banking associations, or other corporations, shall be as-

essed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of State, county or municipal taxes, at the place, town, ward or district where such bank or banking associations, or other corporation, is located, and not elsewhere, whether the said stockholder reside in said place, town, ward or district, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in the State," &c.

By the 19th section of this act, it was enacted, "That section 1, of an act passed 13th of March, 1868, be so amended as to exempt all interest-paying State, county or corporation bonds owned by citizens of this State from taxation. Next the act of the 25th of February, 1870, was passed, the first section of which enumerates the property that shall be valued and assessed, and subject to taxation for State and county purposes; and in this is included, without reciting the whole section, all moneys secured by mortgage or deed of trust; money in actual or constructive possession; money due from solvent debtors, whether by bond, bill single, promissory notes or judgments; also, all articles of agreement for the payment of money, and accounts on solvent parties; leasing interest owned or possessed by any person or persons whatsoever, except for notes or bills for work and labor done; also, all shares of stock in any bank, institution or company, now or hereafter incorporated, by or in pursuance of any law of this State, or any other State; and all public bonds or stocks whatsoever, other than bonds of the United States, which by the laws of the United States are expressly exempt from taxation; all incomes from bonds and stocks which are exempted from taxation by the laws of the United States, or the State of Tennessee," &c.

By the second section it is provided, that the rate of taxation upon all the property enumerated in the 1st section shall be 20 cents on the \$100. It is under these several acts that the taxes in question are claimed.

For the parties resisting the tax, it is argued that these acts are all, but amendatory of the Code, and must be construed together. That the 19th section of the act of the 1st of March, 1869, repealed the 1st section of the act of the 13th of March, 1868, thereby exempting from taxation all interest-paying State, county and corporation bonds owned by citizens of this State, and that this 19th section of the act of 1st March, 1869, is not repealed by the 1st section of

the act of 25th of February, 1870, above quoted; and that "interest-paying State, county, or corporation bonds, owned by citizens of this State," still remained exempt from taxation after the passage of the act of 25th February, 1870; and from this it results that a greater rate of taxes was imposed by these laws upon stock in the National Banks than was imposed upon other moneyed capital in the hands of individual citizens of said State, to-wit: these interest paying State, county and corporation bonds, which were exempted from taxation all together.

The object had in view by the passage of the act, authorizing National Banks, was to create a national currency secured by United States bonds; and the successful operation of these banks, it was supposed, would materially aid the government itself in its various departments; and as these banks were to be located in the various States, and to be subject to State taxation, it was provided, in order to prevent State taxation from crippling the successful operations of these banks, that, in levying this tax there should be no unjust discrimination against the capital thus invested, and in favor of other moneyed capital otherwise invested, and which, by the laws of the State, are subject to taxation; but, that where a tax is imposed by State authority upon such bank stock, it shall not be at a greater rate than is imposed upon any other moneyed capital in the hands of its own citizens, which by the laws of the State is taxable.

It will be seen by reference to the act of the 25th of February, 1870, before referred to, that great care and particularity is used in enumerating the property subject to taxation; and in this is included all money in whatever form it may be, and all stocks of every character; and the rate of taxation fixed upon all property, which by the act is made taxable, is 20 cents on the \$100; and it is not denied that, so far as taxes are imposed at all, that the rate of taxes upon these stocks and all stocks and capital, is precisely the same. But the argument is, that there was a large portion of moneyed capital of citizens of this State invested in State, county and corporation bonds, that are exempted altogether, and therefore the tax imposed must be held illegal.

The objection is not that a higher rate of taxes has been imposed upon this than other capital, but that a part of the money capital in the hands of citizens of this State has been exempted altogether.

This raises the question, whether or not the State Legislature may

exempt from taxation such property or stocks as its own civil policy may demand, without losing the right to impose a tax upon these bank stocks equal in rate to the tax imposed upon its other taxable property; in other words, does the proviso to the Act of Congress, before referred to, require, as a condition upon which this tax may be imposed, not only that the rate of the tax shall not be greater than upon other moneyed capital, but, also, that all property or money capital, in whatever shape, shall be made taxable.

This question was discussed in the case of *The People vs. Commissioners*, 4 Wallace, 256. In that case, it appeared that no deduction was made from the value of the several shareholders on account of investments by the bank in any securities of the United States, and that such deduction was made in assessments upon insurance companies and individuals.

Mr. Justice Nelson, in delivering the opinion of the court, says: "The answer is, that, upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same, or not greater than upon the moneyed capital of the individual citizen, *which is subject or liable to taxation*. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It sustains a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They can not be greater than the citizens impose upon themselves.

It is known as sound policy, that in every well regulated and enlightened State or Government, certain descriptions of property, and also certain institutions, such as churches, hospitals, academies, cemeteries, and the like, are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform. It would seem to be clear, that, if the exemptions enumerated could be made without disturbing the rates of taxation, that any other exemptions that sound policy might dictate, might also be made, provided it be within the constitutional power of the Legislature. The policy of the State exempting its own bonds is fully justified by the course of the Federal Government upon the same subject. The ad-



ditional burden thrown upon the remaining taxable property by these exemptions falls upon all the other property and citizens alike, the additional burthen thereby falling upon this bank stock is no greater than falls upon every species of taxable property in the State.

In the case of *Lionberger vs. Roase*, 9 Wallace, 468, writ of error to the Supreme Court of Missouri, it was contended that the tax upon the shares in the national bank was in violation of the restriction in the act of Congress, because there were two State banks chartered in 1857, and which, by the provisions of their charters, could not be taxed higher than one per cent., whereas the assessments upon the shares of the others was nearly two per cent.; but the Court held this position untenable, and all that was meant by the proviso was, the States, in imposing the tax, should, as far as they had the power to do so, impose the tax in like manner as they imposed it on their own banks. It will be observed that this case arose and was decided under the provisions of the act of June, 1864, in which restrictions were contained not found in the act of 1868. That is to say, the first named act, in addition to the requirement that the taxes should not be at greater rate than is imposed upon other moneyed capital in the hands of individual citizens of such State, contained also a proviso, that the tax should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State. This latter proviso is omitted in the act of 1868; and the only restriction in this regard, by the latter act, is, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. See 9 Wallace, 474, 475.

The Constitution of this State, in force at the time these acts were passed, provided that "all property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State; that no one species of property, from which a tax may be collected, shall be taxed higher than any other species of property of equal value." Yet it has never been held that this provision was violated by the exemption in question, or by others of a like character.

When the right of the Legislature is conceded to make exemptions, it would seem that that body must be the judge of the policy or propriety of the exemptions made.

We do not say, however, that this might not be carried to a point

beyond their power. What, however, would be the result, should the Legislature see proper to exempt property from taxation, in violation of the spirit of the Constitution, above quoted, we do not say. Would it result that all the tax imposed by the act upon other property would therefore be illegal, and not susceptible of collection? This would be to give an unusual effect to an unconstitutional law: because certain property is improperly exempted, therefore no tax can be collected from other property that is properly taxed. Would not a more reasonable view be, that the fact of the law providing for the improper exemption be declared void. If the argument be sound, that the exemption of these bonds was a violation of the condition in the act of Congress, upon which the right to tax national bank stock is founded, it would seem to follow that the exemption is also in violation of that part of our State Constitution above quoted, requiring equal taxation; and if this be true, then it would result that the exemption was in violation of the Constitution, and should have been disregarded altogether; and this would certainly be more reasonable than to defeat the entire tax law, because of the fact that a part of it is unconstitutional.

We are of opinion that the true construction of this act of Congress is, that the State Legislature shall not have the power to tax these national bank stocks at a higher rate than is imposed upon the money capital in the hands of its own citizens, by the general tax law; but that this does not prohibit the State from making such exemptions as its civil policy may demand, within the power of its own Constitution; for the act of Congress was certainly enacted with regard to this power of the State Legislatures. The act of February 25, 1870, above quoted, is very explicit in the enumeration of all moneyed capital, and but one rate of taxation is prescribed; and if the act had even prescribed that these stocks should be taxed at a higher rate than was imposed by the act upon other property, we should even then be strongly inclined to hold the tax void, only to the extent of the excess over the regular rate upon other property. This would certainly be more reasonable than to hold that, because the Legislature had failed to make the tax exactly uniform, that therefore the stock should be relieved from taxation altogether. This was so held in the case of *Frazier et al. vs. Seeben et al.*, 16 Ohio.

The result of contrary holding would be to hold, these bank stocks should be relieved from taxation altogether in this State, for the in-

advertence of the Legislature, while in other States they would have the tax to pay. See 55 Penn., 45; 31 N. J., 399.

We are of opinion that the tax in question was lawfully imposed by the act of February, 1870, and the acts of which it is amendatory, without regard to the question whether the 1st section of said act repeals the 19th section of the act of March 1, 1869, exempting State, county or corporation bonds, or not; and this makes it unnecessary to decide this question.

The next question argued is, that if it be even conceded that the Legislature had the power to levy the tax in question for State purposes, that the corporate authorities of the city of Nashville had no power to assess and collect a tax upon this stock for municipal purposes, for the reason that the act of Congress before referred to does not authorize it.

It is, perhaps, not strictly accurate to say, as has been said in argument, that the power to impose this tax is derived from the act of Congress. The power to impose taxes is a power inherent in the Government, in its sovereign capacity. The Constitution defines this power, and gives general directions as to the manner of exercising it; and bank stocks are expressly enumerated in the Constitution as taxable.

The constitution also provided that the General Assembly shall have power to authorize the several counties, and incorporated towns in this State, to impose taxes for county and corporation purposes, respectively, in such manner as shall be prescribed by law, and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

The Act of Congress before referred to so negatives the idea, that the stock in said banks were exempted by the act, embodies the proviso in question; that is, "that nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where said bank is located, and not elsewhere, &c., "provided," &c. This, we think, is not giving to the State, by the Act of Congress, the power to impose the tax; but it is a proviso, that the act in question was not intended to interfere with the power already possessed by the State to impose the tax, but that power should still remain, with cer-

tain restrictions, however, that Congress might lawfully impose. Congress did not see proper to undertake to interfere with the power of the States, to impose these taxes by exempting the stock altogether, but simply to throw certain restrictions upon the exercise of that power, in order to preserve these institutions intended to maintain the public credit, from being destroyed by State taxation. The question is, how far the restriction or limitation of the power or exemption is intended to go? The Act of Congress was certainly passed in view of the power of the State, under its own constitution and laws, to impose the tax, and in view of the different purposes for which the tax might be imposed.

We can not see any reason why Congress would permit the State tax to be imposed, and at the same time exempt the stock from taxation for county or municipal purposes. If this species of property should bear its just proportion of State taxes, we can see no reason in principle why it should be exempted from their just proportion of municipal taxes. These banks are certainly as much interested in maintaining a city government, and police regulations, for their own protection, as the individual citizen, and should bear their just part of the burthen of maintaining it, unless they are exempted by some positive law. Did Congress intend by the act in question, to exempt these stocks from taxation for municipal purposes? The language is, "that nothing in this act shall be construed, &c., to prevent all shares, &c., from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority." We understand taxes imposed by the city authorities of Nashville are imposed "under State authority," as much so as the State taxes proper. This proviso in the Act of Congress was enacted with a view to the laws of the State, and the fact that cities and towns where banks are usually located always maintain a city government by taxation; and we think it can not be maintained successfully, that Congress intended to exempt this stock from taxation for city purposes. The fact that the act contains, also, a proviso, "that nothing in it shall be construed to prevent real estate owned by such corporation from being taxed for State, county or municipal purposes, as other real estate," sustains this view.

We regard, furthermore, the question as settled by authority. We understand the question to have been involved and settled in the cases of the *City of Utica vs. Churchill et al.*, 33 New York Court of

Appeals; *The People on the relation of R. L. Kennedy vs. The Commissioners of the City of New York*, 35 N. Y.; same case, 4 Wallace, 244; *The People vs. The Assessor of the City of Albany*, 36 N. Y., Monroe Savings Bank *vs. The City of Rochester*, 37 N. Y. No distinction seems to have been attempted in these cases between the power of the State to impose the tax for State purposes, and the power to authorize counties or cities and incorporated towns to assess a tax for county and municipal purposes; and the question in this view is not discussed. Upon principle, we think there can be no distinction.

In the case of the *Mayor of Nashville vs. W. J. Thomas*, 5 Cold., 600, the taxes were assessed by the City of Nashville; and although the tax was held illegal, because in the opinion of the court the Legislature had not provided for the assessment of the taxes in accordance with the Act of Congress; yet, no intimation is given, that, under a proper law of the State, the tax might be assessed; but on the contrary, the court expressly say that it might be done.

The only remaining questions are, as to the place where this stock is taxable. Some of the parties reside in the City of Nashville, others reside in Davidson county, outside of Nashville; others again are residents of Tennessee, but not of Davidson county; and the question is, can the stock of these two latter classes be assessed for State, county and municipal purposes in the City of Nashville?

We think it may be safely assumed, that, previous to the passage of the Act of 1st of March, 1869, the settled law of this State was, that bank stock was taxable only in the county of the owner's residence. It was so distinctly announced in the *Union Bank vs. The State*, 9 Yer., 490; and although that cause was decided upon other grounds, which probably made the decision of this particular question unnecessary, yet the reasoning of the court is entitled to great consideration. It follows, from the nature of the property in question, under our laws, personal property is taxable in the county where the property is at the time of the assessment: Code, 553.

Bank stock is not a legal right to any portion of the property or assets of the corporation, but only the immediate right to receive his share of the dividends as they are declared, and the remote right to his share of the effects, upon the dissolution of the institution. This stock, or right, is in the nature of a chose in action, and can have no locality on account of the location of the bank, but may be sold and

transferred elsewhere; and for the purpose in question, would, under the law as it stood previous to the act of March 1, 1869, follow the person of the owner. This question was elaborately examined in the case of *The Mayor of Nashville vs. W. J. Thomas*, and after a careful review of authorities, the Court arrived at the same conclusion. The same doctrine was held in the case of *The City of Utica vs. Churchill and others*, 33 N. Y., 243. It was, however, held in that case, that a Legislature might change this rule, which, in that State they had done. Upon this question DeWitt, C. J., says: "Our laws, prior to the enabling act, required that the taxation of personal property shall be in the town or ward where the tax-payer resided. I was at first inclined to the opinion that the provision of the national banking law so often referred to, might be considered as a change of our own law, and might be sustained on account of its relations to the national banks, which are within the sphere of Federal legislation. On further reflection, I have concluded that it would be more correct to hold that the effect of the proviso is to permit the States so to shape their laws of taxation as to tax all the shareholders at the place where the bank is situated, as has been done by the enabling act." There may be authorities holding a different view; but we are content to follow the doctrine laid down in *Union Bank vs. The State*, 9 Yer., and *Mayor of Nashville vs. W. J. Thomas*, 5 Cold.

But the question now recurs: Has our law, as to the taxation of these stocks, been changed by the act of March 1, 1869, and if so, had the Legislature the power to make this change? A good deal of controversy had arisen as to the meaning of the words, "place where the bank is located, and not elsewhere," in the act of Congress of June, 1864; and to meet this, the act of February 10, 1868, was passed, which provides that these words shall be construed to mean the State within which the bank is located; and the act proceeds in these words: "And the Legislature of each State may determine and direct the manner and place of taxing all shares of national bank stocks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; and *provided always*, that the shares of any national bank owned by non-residents of any State shall be taxed in the city or town where said bank is located, and not elsewhere." After the decision of the case of *The Mayor of Nashville vs. W. J. Thomas*, 5 Cold., the act of March



1, 1869, was passed, the 9th section of which provides that "no tax shall hereafter be assessed upon the capital of any bank or banking association, or other joint stock company, organized under the authority of this State or of the United States; but stockholders in such bank or banking associations, or other corporations, shall be assessed and taxed on the value of their shares of stock therein. Such shares shall be included in the valuation of the personal property of such stockholders, in the assessment of State, county or municipal taxes, at the place, town, ward or district, where such bank or banking association, or other corporation, is located, and not elsewhere, whether said stockholder reside in said place, town, ward or district, or not; but not a greater rate than is imposed upon other moneyed capital in the hands of individuals of the State." It is very clear that this act, in unambiguous terms, makes the change contended for, as to place where the stocks shall be taxed, and makes them taxable at the place where the bank is located. Is there any question as to the power of the Legislature to make this change? It is clearly within the power given by the act of Congress. The purpose of that act was to leave this question of the county or city where the stock of its own citizens in these banks should be taxed, entirely to the State Legislature. As to non-residents, however, the act of Congress provides that their stock shall only be taxed at the city or town or ward where the bank is located, and not elsewhere. It will be seen that the 9th section of our act of March 1, 1869, above quoted, is substantially the same as the act of the Legislature of New York, of April 23, 1866, as passed upon in the case of *The People vs. The Commissioners*, 4 Wallace, 244, and held to be in compliance with the act of Congress. Is this act in violation of any provision of the Constitution? It has not been so contended; and we are aware of no constitutional limit upon the power of the Legislature in this regard. In the case before referred to, of *The Mayor of Nashville vs. Thomas*, 5 Cold., Judge Smith says: "Nothing here said is to be understood as implying that shares of stock owned by residents or non-residents may not be made by legislative enactment, taxable at the place of the corporation of which it is an incident. The contrary opinion, if ever held or expressed in any decision of this Court, is obsolete." See, also, the case of *The City of Utica vs. Churchill*, 33 N. Y., before referred to.

We hold, therefore, that the Legislature having, by positive enactment, provided that the stock of its own citizens in these banks shall



be taxed in the city, town or ward where the bank is located, whether the stockholder reside there or not; and this being within the express power given by the act of Congress, and not in violation of any provision of the Constitution, that the taxes may be legally so assessed.

The judgments in the several cases will be in accordance with this opinion.

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*LAFAYETTE EZELL ET AL. VS. SARAH H. EZELL.*

1. *Where an estate for life, or years in a series of consecutive remainders, fails by reason of the refusal or inability of the grantee to take, the consequence is to accelerate the next remainder.*
2. *The contrary doctrine that, under the like circumstances, a rent charge for a number of years sinks for the benefit of the heir, does not apply.*
3. *CASE IN POINT. The testator having five tracts of land, willed four tracts to his four children by the first marriage, and his home tract he willed to his widow, during life or widowhood, with remainder to their infant, Sarah. The widow dissented from the will, and had dower assigned to her in 230 acres, 53 acres of which was in the home tract, and the remainder in the lands willed to the four elder children. Held, that the 100 acres of the home tract, which was thus uncovered, passed immediately to the infant, Sarah, although neither the life nor widowhood of the mother had determined.*

**OPINION OF E. H. EWING.**

By agreement of counsel in the above cause, it was referred to me for decision. I proceed to give my opinion on the points raised by the record.

Lafayette Ezell, Sr., made his will in 1852, and died shortly afterward, in the same year. He left a widow, with one child, the defendant, an infant in arms, named Sarah H. Ezell, and four children by a former marriage. He owned at his death, and disposed of by his will, about 883 acres of land. By the first clause of his will, he devised as follows: "I give to my wife, E. J. Ezell, during her natural life-time or widowhood, the tract or parcel of land I now live on, being on the north side of Mill Creek. At the death of my wife, or end of her widowhood, the land above named, shall be inherited by my infant

daughter, Sarah H. Ezell; if my infant daughter should be dead, then the land and all other property my wife may have from my estate, shall be equally divided among the rest of my children." This tract of land contained 153 acres. By his will, the testator gave his other lands to be equally divided among his four children by his first marriage, providing, however, for a somewhat different division upon a certain contingency. This contingency did not happen, and the will took effect as to the equal division. The widow dissented from the will in due time, and dower was assigned to her in the whole of her husband's real estate. The dower lands included 53 acres of the 153, and the residue of the dower was taken from the other lands of the testator, being about 230 acres, or in all about 283 acres. By a proceeding in court, in 1858, the remaining lands of the testator were partitioned among the elder children of the testator. In this partition no notice was taken of the 100 acres bequeathed to the widow and her daughter, and not included in the dower. This 100 acres has, since the testator's death, remained in the possession of the widow, who has received the rents and profits, claiming them for her daughter, Sarah, though not her legal guardian. The bill in this case is filed by the survivors and representatives of the elder children against Sarah H., for the purpose (so far as my opinion is desired) of ascertaining the rights of the elder children and the said Sarah, in the life estate given by the will to the widow in the 100 acres not embraced by either the partition heretofore made, or the dower. The widow is still alive, but is not made a party.

It is agreed by counsel for both parties, that the testator did not die intestate in regard to this 100 acres, either as to the life estate or the inheritance, and such, indeed, in view of the facts of the case, is the law. No time need be expended, however, to show that such is the law, as it is admitted by both parties. One of the consequences of this admission is, that, in no event, can this life estate go to the heirs general of the testator, as nothing goes to the heir, in case of a will, except property undisposed of by the will.

By the will, Sarah took a vested remainder in the 153 acres. She was a person *in esse*, capable of taking, and ready to take, upon the happening of a *necessary* contingency. The marriage of the widow might never take place, but her death was inevitable, and upon the happening of either of these, the remainder was to take effect in possession. See 2 Chitty's Black, p. 169, and n. 10; Fearn on Remain-

ders, p. 217. It may be that it is not material whether the remainder is to be regarded as vested or contingent. It is sufficient to say that it is clearly a vested remainder; especially is it so, when taken in connection with another provision of the will, in regard to both of his daughters. In an ordinary case, where there is nothing peculiar in a will, where each part is to be construed by itself, and not to derive aid for its construction from other parts of the will, the first clause of this will could be construed only to mean, either that the estate should go immediately by acceleration to the remainderman, upon failure of the life interest to take effect, or that, in that case, as to the life estate, the testator left it undisposed of. This latter construction, in the case supposed, would be inconsistent (as already stated) with the agreement of the parties, as well as the rule of law. It is insisted, however, that there is something in the other parts of the will to show that the doctrine of acceleration was not intended to apply. It is urged that the provision for the widow and her child was given in lieu of dower in part; that the child was intended to be provided for through the mother during the mother's life, and after her death by the inheritance of the 153 acres. And upon this view, it is said that maternal affection would be a sufficient reliance during the widow's life, or while she remained unmarried, and that upon either her death or marriage, the child would be provided for by the falling in of the estate; and that thus, his daughter Sarah being fully provided for, it was in no event his intention that she should have the estate pending the life or widowhood of her mother. But this argument leaves out of view another contingency, which the law presumes to have been in the mind of the testator at the making of his will, viz.: the rejection by the widow of the provision in her favor, and the taking of dower by her. What, then, was to become of the daughter's support? The right to dower is a right paramount to the will, and taken in defiance of it, and is burdened with no obligation of maternal affection, which might seem to attach to a widow who takes alms at the hands of her husband, and who assumes the burdens naturally arising out of the relation of a mere beneficiary. Suppose the remainder had been given to a stranger instead of to the widow, and she had rejected the life estate provided for her, and taken dower out of the lands of her children, though their loss in that case would have been the same, and the widow's gain only the same, there would have been no argument of

intent against the principle of acceleration. Is, then, an incidental benefit to her child, and to the father's child, to be made an argument against the application of a doctrine of which a stranger could have full advantage? It is not pretended that, in any part of the will there is a disposition of this life estate, in case of its failure from any cause, except by inference from intent.

Again, if this life estate, having failed, does not fall in to accelerate the estate of the remainderman, what becomes of it? By the agreement, it is not lapsed, it does not go to the heir general; how is it disposed of, unless by the rule of law, which is part of a will, and comes in aid of its construction, in case of failure of the life estate. There is no residuary clause in the will. I have looked closely into it, and I find no intent to make equality *even*, except equality among his four elder children, in regard to the lands given to them. Both complainants and defendant seem to me to have taken positions savoring very little of the doctrine that equality is equity. The complainants having all got more than an equal share of the estate, (leaving out of view the widow's dower, which can not be looked at,) with reference to Sarah, studiously insist that the life estate has not lapsed, to avoid collation; and the defendant assents to this, thinking to keep more than she could get, or at least as much, by bringing her life estate into hotch-potch.

I am not much moved by the natural equities of the case to make a strain of the law in any direction.

The provision for the widow and her daughter in the will is manifestly an unequal and inadequate one. If the widow had been given nothing by the will, her daughter 153 acres, and the others, each, 184 acres, (as they were, in fact,) then when the widow came to take dower, suppose she had taken 53 acres from her daughter, and 53 acres from each of the others, she would have done almost exactly what she has now done; that is, she would have got her dower, and left her daughter 100 acres of land, and each of the others about 125 acres. The manner in which the lands were divided among the heirs in 1858, and the omission to take into consideration the life estate in the 100 acres, it will be seen in the sequel, need not be considered.

If, then, it be apparent that no other part of the will can be brought, with effect, in aid to construe the first clause; and if it be admitted that the testator did not die intestate as to the life estate in the 100 acres, what follows from its failure to take effect in the person to

whom it was given? It follows that, by that clause, it goes to some one else; as if it had been written, "and *upon* my wife's dissenting and taking dower, I give her life estate to Sarah or to my other children, or to my heirs." There is no rule of law, or pretended rule, that could insert the words, "to my other children," in the absence of aid from other parts of the will; nor is there any rule to insert the words, "to my heirs." If there were no obstructing rule, it would go to the heir as undevised, not as devised. So that, if the whole estate in the 100 acres be devised, it does not go "to the other children, nor to the heirs." Is there a rule of law that carries the estate for life to Sarah, as against the heirs, and this without the admission that the whole estate is devised? Is any admission necessary? Has she not in her favor a positive rule of law, giving her the estate?

It is admitted, and is doubtless the law, as laid down in the text books and all the decisions, that where an estate is given in land to one for life, and to another in remainder, that if the gift of the life estate is void for any cause, as to a monk or to superstitious uses, or if it is given to one who refuses to take, as to an infant who refuses to take when he becomes of age; or if it is surrendered without consideration, or forfeited; in all these cases the estate of the remainder-man is accelerated, and he is entitled to immediate possession. It is insisted, however, that where the life estate is declined or surrendered in order to take something else from the estate of the donor in lieu, that the rule does not apply, and that the life estate in such a case goes either to the heir as undevised, or to some person whose right may be discovered from the whole scope of the will, or to indemnify some one whose estate is diminished by the election of the donee. Now in the case before me, it would be perhaps of little avail to the complainants to establish the doctrine that the estate would go as undevised, and it would also be inconsistent with what they contend for and admit. But as it is my opinion that the rule above referred to, applies as well to the one class of cases as the other, I shall look no further to the admissions of complainants, or to the effect that these admissions would have on his interests.

I believe the rule of law, then, as established in Tennessee, to be this: that wherever the life estate fails from any cause, to take effect, that the remainder-man is entitled to immediate enjoyment and possession of the estate. This general proposition embraces the case of a widow who dissents from a will giving her a life estate and takes

dower. She has nothing to do with the will but to dissent from it. When she has done this, the estate is open to her. Every will is made in view of this right. No one is wronged or injured by the assertion of it. The husband can provide, if he will, to equalize the rights of his devisees for any damage done by an eccentric assertion of her right. He can provide, that, if any specific devise is materially affected by the assignment of dower, the devisee shall be indemnified by contribution. If he fails to do this, it is because he does not choose to make provision for the case. A will which fails to allude to such dissent and claim of dower, can not be construed in the light of her subsequent act. Consequences that he might have provided against and that he might well anticipate, are presumed to have been in his mind. Can the husband be then said to have died intestate as to a life estate, which it is so common to have surrendered or refused? Could he not much more readily anticipate a refusal to accept by a widow who has her indemnity in dower, than by one who would surrender or refuse and take nothing from his estate? Could he anticipate a forfeiture? Would he probably know that a gift to a monk or to a superstitious use, was void? And yet it is agreed that in these latter cases the estate falls in and does not go as undevise.

Now, if it were a question whether the widow herself should derive any benefit under the will, there might be some reason for making an exception in her case to the general rule; but here the estate goes to her child; she has no pecuniary interest; her maternal feelings may indeed be gratified in such a case, and she may even rejoice to defeat what she deems the unjust will of her husband.

The rule I have stated above as a general rule, is so stated by Jarman in his Treatise on Wills: See 1st Jarman, p. 513. The cases cited by him do not embrace that of dissent by a widow and claim of dower, nor could they, as no such case could occur in England. There is a case, however, in our own books, that of *Armstrong's Adm'r vs. Parkes' Devisees*, 9th Humph., 195, where this principle is carried out in the case of a widow's dissent. And in a late case in 4 Cold., page 51, *Waddle vs. Terry*, the general principle is laid down and many authorities cited to sustain it. As to the reason or policy of the rule in its inception, I have nothing to say. I find it well established, and I do not find any exception to it. Many other authorities are cited in the Briefs in the case, some of which are also referred to in the decision above of our own Courts. I do not find in them,

however, any thing to impugn my decision, and much to sustain it. The cases referred to upon Rent charges, if they stood alone, and if there were no cases directly upon the point, and we were left to puzzle our way out by analogies, might present considerable difficulty. Those cases are, however, treated apart from the direct question here presented; the decisions upon them are conflicting and unsatisfactory, and do not, I think, demand examination at my hands. Upon the whole matter referred to me, I am of opinion that Sarah H. Ezell, upon her mother's dissent from the will, was entitled to the immediate possession and enjoyment of the 100 acres not covered by her mother's dower. The case has been argued with exceeding ingenuity, and I believe that I have got all the light that can be thrown upon it.

EDWIN H. EWING, *Referee.*

#### ADDENDUM.

Though in deciding the Ezell case I did not think it either necessary or proper to go into the discussion of what might be done with a rent charge as between the heir and devisee, in case the donee refused it or the object for which it was created was void, yet I might perhaps well make this remark by way of *addendum* to my opinion, viz.: that a Rent charge is not an estate in the land; that it neither limits nor diminishes the estate, nor takes out of it anything but its profits or a portion of them; there is but one taker of the estate, and the whole estate is subject to the Rent charge. Although a Rent charge may be for a specific term of years, or indefinite that is until some definite object is accomplished, or for the life of a person, yet it is at last but a mode of raising money out of the estate. Whether this should go to the heir or the devisee, (in the absence of controlling words in the will,) would depend, perhaps, originally upon no principle, and might be determined either way according to the special hardship of the case. This probably has bred the conflict of opinion upon this subject.

E. H. E.

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NOTE.—This case was by request, twice argued before the Chancellor, who was of opinion that the testator died intestate as to the 100 acres of the home tract not included in the dower. It was afterwards argued in the Supreme Court, but no opinion was had. It was then, in vacation, by agreement, left to the determination of Mr. Ewing. The older children were represented by Mr. Thompson, and the infant Sarah, by Mr. Cooper. Although often decided in England, it is believed that the same question has never been before so fairly presented in the United States.



## BOOK NOTICES.

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*Fisher's Digest of Criminal Law.* By R. A. FISHER, Esq., of the Middle Temple Barrister at Law, in 1 Vol., from the Excelsior press: Bacon & Co., printers, 536 Clay street, San Francisco; and for sale by Paul & Tavel, 48 Union Street, Nashville, Tenn.

The ratio of crime in a country is, strange to say, in proportion to its advancement in the scale of civilization.

The refinements of modern art and ingenuity and the existence of a high state of commercial and material prosperity, while exerting an inestimable influence in developing the power and wealth of a nation, tend likewise, toward the increase of vice and criminal practices.

In the complicated transactions of large and flourishing communities, new artifices are constantly employed to evade the force of criminal laws already existing, while the increasing density of our population foment pernicious desires and appetites, which, in the earlier days of the country, were unheard of, and to remedy which requires either the enlargement of the criminal code, or the expansion of common law principles, to meet exigencies as they arise.

*"Dolus crescit in orbe mundi,"* and the means by which it may be circumvented, must likewise be increased.

On account of the diversified pursuits and interests of our people, growing out of the wonderful progress we have made in material wealth and consequence, the American Bar are beginning to appreciate what the English Bar have long since done—the necessity of dividing the practice of the law into specialties; and the time can not be very far distant when the duties of our practitioners will be of such a nature as to render it both necessary and convenient to define the different kinds of lawyers, with as much distinctness as we now do the difference between a lawyer and a member of any other profession.

To the lawyers, therefore, who make a specialty of the criminal law, and to prosecuting officers of the State and Federal Governments, the volume here briefly noticed, recommends itself, because of its cheapness, the reputation of its compilers, Messrs. Harrison & Fisher, and the clear and methodical manner in which it is arranged. It is a digest of the reported criminal cases, relating to criminal law, criminal information and extradition from 1756 to 1870 inclusive, and is founded upon Harrison's Analytical Digest. It is a full reprint of Fisher's Common Law Digest of the Titles, Criminal Law and Information, and is a complete compendium of English law of crimes and punishments, upon which our American criminal law is founded. Some of the cases being based upon statutory provisions, it was deemed wise to include the digests of statutory enactments, which precedes the notes of cases in Mr. Fisher's work, and in this volume. The later decisions from the tenth and eleventh volumes of Cox's Criminal Cases, have been added under their appropriate heads. Each note has been compared with the original volume of Reports, and the citations have been corrected and verified.

We cordially commend it to the profession.

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*American Trade Mark Cases.* A compilation of all the reported cases decided in the American courts, prior to the year 1872, with an Appendix containing the leading English cases, and the United States' acts in relation to the Registration of Trade Marks, with the constructions of the Commissioners of Patents affecting the same. Edited by ROWLAND COX, Counsellor at Law, and Editor of the American Law Times. Price, \$8.00. Robert Clarke & Co., publishers, Cincinnati, Ohio.

This work of Mr. Cox, containing nearly eight hundred pages, is printed and bound in a style very creditable to the printers, and is, doubtless, what it purports to be—a compilation of all the American Trade Mark cases decided prior to 1872.

Though we have hurriedly examined this compilation of Mr. Cox's, we are satisfied that it is a valuable acquisition to a general law library, and may be of great benefit to the profession in those States of the Union where the manufacturing interests are extensive. Although the general law upon the subject may be found in ten or twelve leading cases, sufficiently defined and construed for all ordi-

nary purposes, a volume containing all the decisions upon the subject would be of invaluable assistance in complicated cases, or in our large cities where such cases are of frequent occurrence.

We are satisfied, upon examination, that all the leading cases are comprehended in Mr. Cox's work. Many of the cases may be found collected and arranged in the 14th Vol. of Hunt's Merchants' Magazine, on page 330, from the pen of Mr. Charles Edwards, of New York, and by the reporter to the case of *Coats vs. Holbrook, Nelson & Co.*, 2 Sand., N. Y. C. R., 586.

The syllabi of Mr. Cox's work are in the main, correctly prepared, perhaps as correctly as those of any book of Reports, State or Federal.

*Smith's Manual of Equity; Smith's Manual of Common Law.*

These works, just published in the United States, are from the hands of one of the most eminent of the present English law writers. The style of the works is characterized by the highest degree of force and simplicity. Each volume contains about 500 pages. The work on Equity was first published, and has rapidly passed through nine editions in England.

It has been used for some years by the Board of Legal Education at Lincoln's Inn, for purposes of examination.

The Albany Law Journal, speaking in the language of an eminent English Judge, states that it is the most masterly outline of the Science of Equity ever drawn.

The work is based on that of Mr. Story & Spence, and Leading Cases on Equity.

The American editor states that the ability with which he arranges, digests, defines, distinguishes and qualifies, has secured the prachighest tribute of praise in England.

The Manual of Common Law, is equally condensed and valuable. It was intended as a companion to the author's Manual of Equity, and is founded, as the author states in the 4th London edition, "on about seventy text books." He states that "it was written for the practitioner, the student and the general reader."

Whether the Manual be regarded as a first book or second book, the student would do well to read it as his final text book. This would revive in his mind some two thousand leading points of the

most constant recurrence in daily practice. The student may, however, regard this as a "hard book." But how can it be otherwise than hard, when many of the distinctions and qualifications are, in their own nature, complex or refined, and when it contains such a multitude of points in a small space?

The crowding of propositions on the mind is, of course, attended with a sense of labor, but that labor is all effectual and short. In the other case, the student passes on more readily and pleasantly, and he fancies he has made great progress, because he has waded through a great number of pages.

But, if the result of the two modes of study were compared, the knowledge acquired in the latter case, would be found to be little more than a general and inaccurate impression, limited to a few points likely to fade, and incapable of being revived without great labor; whereas, the knowledge acquired by the help of a book like this, will be found to be comparatively specific, accurate and complete, and can be gained in an incomparably shorter time, and may be revived easily and speedily.

We think it probable that these unpretending volumes will find in the end, ample recognition of their merits in the Law Schools and in the office of the practitioner.

Mr. Smith is one of the Commissioners under the Crown, engaged in the work of Law Reform; and these works give some support to the idea of codifying the great body of Common Law and Equity now prevalent in England and in several of the American States.

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*A Treatise on the Conflict of Laws, or Private International Law, including a Comparative View of Anglo-American, Roman, German and French Jurisprudence.* By FRANCIS WHARTON, LL.D., Author of "A Treatise on American Criminal Law," "Precedents of Indictments," "State Trials of the United States," Etc. Philadelphia: Kay & Brother. 1872.

We have carefully examined this new work from the pen of Dr. Wharton. No lawyer wishing to be informed in regard to the many and great changes which have been effected since 1834, when Judge Story first published his invaluable work on the "Conflict of Laws," to the present time, can afford to be without this work of Wharton's. No where else, that we are aware of, can he find these changes so ably

and succinctly set forth. How enormous and far reaching they have been, in the first paragraph of his very interesting work, Dr. Wharton thus indicates: "Four causes have recently operated to revolutionize much of what once was accepted doctrine in private international law. These causes are, first, the adoption by England, France, Germany, Austria, Italy and the United States, of naturalization treaties, by which the old tenet of perpetual allegiance has been surrendered; second, the abolition of slavery in the United States and Russia, removing the last support of the theory of extra-territorial effect of caste; third, the enormous comparative increase of personal as distinguished from real property, exacting from the courts the abandonment of the old doctrine that personalty is governed by the law of its owner's domicile, and placing it equally, with realty, under the protection and restrictions of the place where it is situated; and, fourth, a growing sense on the part of England and the United States of the duty imposed on them of punishing offenses committed outside their territory against their laws, leading them to relinquish their original practice in this respect, and to accept with the rest of Christendom, the rule, that in such cases, the country of arrest has jurisdiction, as well as that of the commission of the crime."

Dr. Wharton has placed the profession under obligations for many valuable works heretofore, but in our judgment his most lasting and solid fame will rest upon this very able, learned and exhaustive treatise on "The Conflict of Laws."

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Mr. FRANCIS HILLIARD, the well known author of valuable works on different branches of the law, has just brought out a new work on *The Law of Contracts*. He is so well known to the profession as an able author, that an extended notice is rendered unnecessary. It is sufficient to say, that this new work is just what we should have expected from him. In this new work, the profession will have a full and accurate reference to all the decided cases upon the law of contracts. Of course this work will be of great value to the practicing lawyer, as it will enable him to easily consult all the cases bearing upon the subject before him, for investigation.

# C H A R T

## OF THE

# Southern Law & Collection Union.

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“	Morgan, Lapsley & Nelson,	“
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**ALABAMA.**—*Continued.*

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Marengo,	Geo. G. Lyon,	Demopolis.
Marshall,	Wyeth & Boyd,	Guntersville.
Mobile,	J. P. Southworth,	Mobile.
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**ARKANSAS.—Continued.**

County.	Name.	Post Office.
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"	F. T. Rice,	Lewisburg.
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**ARKANSAS.**—*Continued.*

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**ARIZONA TERRITORY.**

Prima,	J. E. McCaffry,	Tucson.
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“	Campbell, Fox & Campbell,	“
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Tulare,	S. C. Brown,	Visalia.

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Gilpin,	Lewis C. Rockwell,	Central City.

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Hamilton,	Henry J. Stewart,	Jasper.
Hillsboro,	Henderson & Henderson,	Tampa.
Jefferson,	Scott & Clarke,	Monticello.
Leon,	Edwin H. Tapscott,	Tallahassee.
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Putnam,	Calvin Gillis,	Pilatka.
St. Johns,	W. Howell Robinson,	St. Augustine.
Santa Rosa,	John Chain,	Milton.

**FLORIDA.**—*Continued.*

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Cass,	Robert W. Murphy,	Cartersville.
Chatham,	Harden & Levy,	Savannah.
		79 Bay Street.
Clarke,	S. P. Thurmond,	Athens.
Clay,	John C. Wells,	Fort Gaines.
Clinch,	J. L. Sweat,	Homersville.
Cobb,	W. T. Winn,	Marietta.
Coffee,	Same as Pierce County,	
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Coweta,	Lucias H. Featherston,	Newnan.
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**GEORGIA.**—*Continued.*

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Pierce,	John C. Nicholls,	Blackshear.
Pike,	H. Green,	Zebulon.
Polk,	Batt Jones,	Van Wert.
Pulaski,	Charles C. Kibbee.	Hawkinsville.
Randolph,	E. L. Douglass,	Cuthbert.
Richmond,	A. R. & H. G. Wright,	Augusta.
Schley,	Hudson & Wall,	Ellaville.
Schreven,	Geo. R. Black,	Sylvania.
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Sumter,	Hawkins & Guerry,	Americus.

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Upson,	John I. Hall,	Thomaston.
Walker,	J. C. Clements,	Lafayette.
Walton,	John W. Arnold,	Monroe.
Webster,	Thomas H. Pickett,	Preston.
Whitfield,	J. A. R. Hanks,	Dalton.
Worth,	Wm. A. Harris,	Isabella.

**IDAHO.**

Nez Perce,	Jasper Rand,	Lewiston.
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**ILLINOIS.**

Adams,	G. W. Fogg,	Quincy.
Alexander,	Allen, Mulkey & Wheeler,	Cairo.
Boone,	C. E. Fuller,	Belvidere.
Cass,	J. Henry Shaw,	Beardstown.
Champaign,	Sweet & Lothrop,	Champaign.
Clark,	Whitehead & Hare,	Marshall.
Coles,	Wiley & Parker,	Charleston.
Cook,	E. A. Otis,	Chicago.
DeWitt,	E. H. Palmer,	Clinton.
Douglass,	R. B. McPherson,	Tuscola.
Edgar,	T. C. W. Sale,	Paris.
Effingham,	S. F. Gilmore,	Effingham.
Fayette,	J. W. Ross,	Vandalia.
Ford,	A. M. McElroy,	Paxton.

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Fulton,	E. T. Campbell,	Lewistown.
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Grundy,	E. Sanford,	Morris.
Hamilton,	R. S. Anderson,	McLeansboro.
Hancock,	David Mack,	Carthage.
Iroquois,	Blades & Kay,	Watseka,
Jefferson,	Casey & Patton,	Mt. Vernon.
Jersey,	M. B. Miner.	Jerseyville
Kane,	Wheaton, Smith & McDole,	Aurora.
Kankalee,	C. A. Lake,	Kankalee City.
Knox,	J. B. Boggs,	Galesburg.
Lawrence,	T. P. Lowry,	Lawrenceville.
Lee,	A. K. Trusdell,	Dixon.
Livingston,	Pillsbury & Lawrence,	Pontiac.
McLean,	Stevenson & Ewing,	Blcomington.
Macon,	I. A. Buckingham,	Decatur.
Macoupin,	John N. McMillan,	Carlinville.
Madison,	Irwin & Krome,	Edwardsville.
Marshall,	A. J. Bell,	Lacon.
Mason,	Wright & Cochran,	Havana.
Massac,	Edward McMahan,	Metropolis,
Mercer,	McCoy & Clokey,	Aledo.
Montgomery,	W. T. Coale,	Hillsboro,
Morgan,	Wm. Brown,	Jacksonville.
Moultrie,	W. G. Patterson,	Sullivan.
Peoria,	Thomas Cratty,	Peoria.
Piatt,	S. R. Reed,	Monticello.
Pope,	Thomas H. Clarke,	Golconda.



**ILLINOIS.**—*Continued.*

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St. Clair,	Kase & Wilderman,	Belleville.
Sangamon,	Broadwell & Springer,	Springfield.
Shelby,	Hess & Stephenson,	Shelbyville.
Stark,	Miles A. Fuller,	Toulon.
Stephenson,	Ingalls & Atkins,	Freeport.
Tazewell,	John B. Cohrs,	Pekin.
Union,	Hugh Andrews,	Jonesboro'.
Vermillion,	Wm. A. Young,	Danville.
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White,	Crebs, Conger & Hamil,	Carmi.
Williamson,	George W. Young,	Marion.
Woodford,	George H. Kettele,	Metamora.

**INDIANA.**

Allen,	Combs & Miller,	Fort Wayne.
Bartholomew,	Jno. N. Kerr,	Columbus.
Boone,	Ralph B. Simpson,	Lebanon.
Cass,	Frank Swigot,	Logansport.
Clarke,	S. L. Robison,	Charlestown.
Clay,	A. T. Rose,	Bowling Green.
Crawford,	N. R. Peckinpaugh,	Leavenworth.
Daviess,	W. J. Mason,	Washington.
Dearborn,	Adkinson & Roberts,	Lawrenceburg.
Decatur,	Gavin & Miller,	Greensburg.
DeKalb,	James E. Rose,	Butler.

**INDIANA**—*Continued.*

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Fayette,	James P. Kerr,	Connerville.
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Fountain,	Nebeker & Cambern,	Covington.
Franklin,	Chas. Moorman,	Brookville.
Gibson,	Wm. M. Land,	Princeton.
Grant,	G. T. B. Carr,	Marion.
Hamilton,	Evans & Stephenson,	Noblesville.
Hancock,	James L. Mason,	Greenfield.
Harrison,	Wolfe & Stockslager,	Corydon.
Henry,	Wm. Grose,	New Castle.
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Marion,	Robert N. Lamb,	Indianapolis.
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Morgan,	J. V. Mitchell,	Martinsville.
Ohio,	S. R. & D. T. Downey,	Rising Sun.
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Poesy,	Spencer & Loudon,	Mt. Vernon.

**INDIANA**—*Continued.*

County.	Name.	Post Office.
Randolph,	Browne & Thompson,	Winchester.
Scott,	W. C. Price,	Lexington.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Sullivan,	Jno. T. Gunn,	Sullivan.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith,	Bluffton.

**IOWA.**

Benton,	John Shane,	Vinton.
Boone,	C. W. Williams,	Boonesboro.
Cerre Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clarke,	Chaney & Reese,	Osceola.
Clinton,	Albert L. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Dusee & Henderson,	Dubuque.
Fayette,	Ainsworth & Millar,	West Union.
Greene,	Jackson & Potter,	Jefferson.
Guthrie,	Wm. Elliott,	Panora.
Hancock,	James Crow,	Illington.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	T. W. & John S. Woolson,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	Geo. D. Woodin,	Sigourney.
Lee,	Seaton & Allyn,	Keokuk.
Linn,	J. M. Preston & Son,	Marion.

**I O W A**—*Continued.*

County.	Name.	Post Office.
Lucas,	E. B. Woodward,	Chariton.
Madison,	J. & B. Leonard,	Winterset.
Marion,	Atherton & Anderson,	Knoxville.
Marshall,	Parker & Rice,	Marshalltown.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Phillips & Phillips,	Des Moines.
Pottawatomie,	Baldwin & Wright,	Council Bluff.
Poweshiek,	L. C. Blanchard,	Montezuma.
Scott,	Stewart & Armstrong,	Davenport.
Tama,	C. B. Bradshaw,	Toledo.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Miligan,	Afton.
Wapello,	E. L. Burton,	Ottumwa.
Warren,	Bryan & Seevers,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Corydon.
Webster,	J. F. Duncombe,	Fort Dodge.
Winneshiek,	John T. Clark,	Decorah.
Woodbury,	Isaac Pendleton,	Sioux City.

**K A N S A S .**

Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Atchison,	Horton & Waggener,	Atchison.
Bourbon,	W. J. Bawden,	Fort Scott.
Butler,	W. T. Galliher,	Eldorado.
Chase,	S. N. Wood,	Cottonwood Falls.
Coffey,	Fearle & Stratton,	Burlington.
Doniphan,	Sidney Tennent,	Troy.

**INDIANA**—*Continued.*

County.	Name.	Post Office.
Randolph,	Browne & Thompson,	Winchester.
Scott,	W. C. Price,	Lexington.
Spencer,	G. L. Reinhard,	Rockport.
Stark,	S. A. McCrackin,	Knox.
Steuben,	Gale & Glasgow,	Angola.
Sullivan,	Jno. T. Gunn,	Sullivan.
Tipton,	John M. Goar,	Tipton.
Vanderberg,	W. Frederick Smith,	Evansville.
Washington,	Horace Heffren,	Salem.
Wells,	David T. Smith,	Bluffton.

**IOWA.**

Benton,	John Shane,	Vinton.
Boone,	C. W. Williams,	Boonesboro.
Cerre Gorda,	Stanberry, Gibson & Stanberry,	Mason City.
Clarke,	Chaney & Reese,	Osceola.
Clinton,	Albert L. Levy,	Clinton.
Des Moines,	Halls & Baldwin,	Burlington.
Dubuque,	Shiras, Van Dusee & Henderson,	Dubuque.
Fayette,	Ainsworth & Millar,	West Union.
Greene,	Jackson & Potter,	Jefferson.
Guthrie,	Wm. Elliott,	Panora.
Hancock,	James Crow,	Hillington.
Hardin,	Enoch W. Eastman,	Eldora.
Henry,	T. W. & John S. Woolson,	Mt. Pleasant.
Jasper,	Smith & Cook,	Newton.
Johnson,	Edmonds & Ransom,	Iowa City.
Keokuk,	Geo. D. Woodin,	Sigourney.
Lee,	Seaton & Allyn,	Keokuk.
Linn,	J. M. Preston & Son,	Marion.

**I O W A**—*Continued.*

County.	Name.	Post Office.
Lucas,	E. B. Woodward,	Chariton.
Madison,	J. & B. Leonard,	Winterset.
Marion,	Atherton & Anderson,	Knoxville.
Marshall,	Parker & Rice,	Marshalltown.
Monroe,	Anderson & Stuart,	Albia.
Page,	Morledge & McPherrin,	Clarinda.
Polk,	Phillips & Phillips,	Des Moines.
Pottawatomie,	Baldwin & Wright,	Council Bluff.
Poweshiek,	L. C. Blanchard,	Montezuma.
Scott,	Stewart & Armstrong,	Davenport.
Tama,	C. B. Bradshaw,	Toledo.
Taylor,	R. B. Kinsell,	Bedford.
Union,	J. M. Miligan,	Afton.
Wapello,	E. L. Burton,	Ottumwa.
Warren,	Bryan & SeEVERS,	Indianola.
Washington,	H. & W. Scofield,	Washington.
Wayne,	W. W. Thomas,	Corydon.
Webster,	J. F. Duncombe,	Fort Dodge.
Winneshiek,	John T. Clark,	Decorah.
Woodbury,	Isaac Pendleton,	Sioux City.

**K A N S A S.**

Allen,	Thurston & Cates,	Humboldt.
Anderson,	W. A. Johnson,	Garnett.
Atchison,	Horton & Waggener,	Atchison.
Bourbon,	W. J. Bawden,	Fort Scott.
Butler,	W. T. Galliher,	Eldorado.
Chase,	S. N. Wood,	Cottonwood Falls.
Coffey,	Fearle & Stratton,	Burlington.
Doniphan,	Sidney Tennent,	Troy.

**KENTUCKY**—*Continued.*

County.	Name.	Post Office.
Taylor,	D. G. Mitchell,	Campbellsville.
Todd,	J. H. Lowry,	Elkton.
Trigg,	Jno. S. Spiceland,	Cadiz.
Trimble,	Jacob Yeager,	Bedford.
Union,	John S. Geiger,	Morganfield.
Warren,	Bates & Wright,	Bowling Green.
Washington,	Richard J. Browne,	Springfield.
Webster,	A. Edwards,	Dixon.
Woodford,	Turner & Twyman,	Versailles.

**LOUISIANA.**

Parish.	Name.	Post Office.
Ascension,	R. N. Sims,	Donaldsonville.
Avoyelles,	Irion & Thorpe,	Marksville.
Baton Rouge,	Geo. W. Buckner,	Baton Rouge.
Caddo,	Newton C. Blanchard,	Shreveport.
Caldwell,	Arthur H. Harris,	Columbia.
Carroll,	Ed. F. Newman,	Providence.
Catahoula,	Smith & Boatner,	Harrisonburg.
East Feliciana,	Frank Hardesty,	Clinton.
Franklin,	Wells & Corkern,	Winsborough.
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine.
Jackson,	James E. Hamlett,	Vernon.
Lafayette,	Conrad Debaillon,	Vermillionville.
Lafourche,	Thomas L. Winder,	Thibodeaux.
Madison,	Wells & Rainey,	Delta.
Morehouse,	Newton & Hall,	Bastrop.
Natchitoches,	Morse & Dranguet,	Natchitoches.
Orleans,	Sam. C. Reid,	New Orleans,



**LOUISIANA—Continued.**

County.	Name.	Post Office.
Orleans,	Canonge & Cazabat,	New Orleans, 24 Exchange Place.
Point Coupee,	Thomas H. Hewes,	Point Coupee.
Richland,	Wells & Williams,	Rayville.
"	H. P. Wells,	Delhi.
St. Landry,	Joseph M. Moore,	Opelousas.
Tensas,	Reeve Lewis,	St. Joseph.
Terrebonne,	John B. Winder,	Houma.
Union,	Barrett & Trimble,	Farmerville.
Webster,	A. B. George,	Minder.
Washita,	R. W. Richardson,	Monroe.
"	Richardson & McEnery,	"
West Feliciana.	Samuel J. Powell,	St. Francisville.
Winn,	W. R. Roberts,	Winnfield.

**M A I N E .**

Kennebec,	Joseph Baker,	Augusta.
Knox,	Geo. H. M. Barrett,	Rockport.
Oxford,	Virgin & Upton,	Norway.
Somerset,	E. W. McFadden,	Kendall's Mills.

**M A R Y L A N D .**

Alleghany,	Semmes & Read,	Cumberland.
Anne Arundel,	Randal & Hagner,	Annapolis.
Baltimore,	Reverdy Johnson & C. G. Kerr,	Baltimore.
"	John Thompson Mason,	"
"	John I. Yellott,	Towsonton.
Caroline,	James B. Steele,	Denton.
Cecil,	Jno. E. Wilson,	Elkton.

**MARYLAND—Continued.**

County.	Name.	Post Office.
Charles,	S. Cox, Jr.,	Port Tobacco.
Frederick,	Wm. P. Maulsby, Jr.,	Frederick.
Prince George's,	Daniel Clarke,	Upper Marlboro'.
Queen Anne's,	John B. Brown,	Centreville.
St. Mary's,	Combs & Downs,	Leonardtown.

**MASSACHUSETTS.**

Bristol,	Charles A. Read,	Taunton.
Talbot,	C. H. Gibson,	Easton.

**MICHIGAN.**

Allegan,	Arnold & Stone,	Allegan.
Barry,	Wm. H. Hayford,	Hastings.
Bay,	C. H. Denison,	Bay City.
Calhoun,	Wm. H. Brown,	Marshall.
"	Alvan Peck,	Albion.
Houghton,	Ball & Chandler,	Houghton.
Huron,	Richard Winsor,	Port Austin.
Ingham,	Wm. H. Pinckney,	Lansing.
Isabella,	I. N. Fancher,	Isabella.
Jackson,	Johnson & Montgomery,	Jackson.
Lenawee,	Geddes & Miller,	Adrian.
Macomb,	Edgar Weeks,	Mt. Clemens.
Marquette,	Maynard & Ball,	Marquette.
Oakland,	O. F. Wisner,	Pontiac.
Oceana,	F. J. Russel,	Hart.
Ottawa,	L. B. Soule,	Grand Haven.
Saginaw,	Gaylord & Hanchett,	Saginaw.
St. Clair,	Atkinson & Parsons,	Port Huron.

**M I C H I G A N**—*Continued.*

County.	Name.	Post Office.
St. Joseph,	Mason & Melendy,	Centreville.
Shiawassee,	E. Gould,	Owasse.
Tuscola,	J. P. Hoyt,	Caro.
Wayne,	Meddaugh & Driggs,	Detroit.

**M I N N E S O T A.**

Benton,	J. Q. A. Wood,	Sauk Rapids.
Dodge,	G. B. Cooley,	Mantorville.
Fillmore,	Murray & McIntire,	Rushford.
Martin,	M. E. L. Shanks,	Fairmont.
Mower,	G. M. Cameron,	Austin.
Olmstead,	Butler & Shandrew,	Rochester.
Ramsey,	S. M. Flint,	St. Paul.
Stearns,	L. A. Evans,	St. Cloud.
Steele,	A. C. Hickman,	Owatonna.
Winona,	Simpson & Wilson,	Winona.

**M I S S I S S I P P I.**

Bolivar,	Geo. T. Lightfoot,	Nebletts Landing.
Calhoun,	A. T. Roane,	Pittsboro'.
Carroll,	James Somerville,	Carrollton.
Chickasaw,	Lacy & Thornton,	Okalona.
Choctaw,	John B. Hemphill,	French Camps.
Claiborne,	J. H. & J. F. Maury,	Port Gibson.
Clarke,	Evans & Stewart,	Enterprise.
Coahoma,	James T. Rucks,	Friars' Point.
Holmes,	H. S. Hooker,	Lexington.
Itawamba,	Clayton & Clayton,	Tupelo.
Jasper,	Street & Chapman,	Paulding.

**MISSISSIPPI—Continued.**

County.	Name.	Post Office.
Jefferson,	B. B. Paddock,	Fayette.
Lauderdale,	Steel & Watts,	Meridian.
Lawrence,	K. R. Webb,	Brookhaven.
Leake,	Raymond Reid,	Carthage.
Lincoln,	Chrisman & Thompson,	Brookhaven.
Lowndes,	Leigh & Evans,	Columbus.
Madison,	S. M. Wood,	Canton.
Marshall,	Strickland & Fant,	Holly Springs.
Monroe,	John B. Walton,	Aberdeen.
Oktibbeha,	Ch. A. Sullivan,	Starkville.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Rankin,	Shelby & McCaskill,	Brandon.
Tallahatchee,	Bailey & Boothe,	Charleston.
Tishomingo,	L. T. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
Washington,	Trigg & Buckner,	Greenville.
Wilkinson,	L. K. Barber,	Woodville.
Winston,	W. S. Bolling,	Louisville.
Yazoo,	Miles & Epperson,	Yazoo City.

**MISSOURI.**

Adair,	Ellison & Ellison,	Kirksville.
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	Wm. O. Forrist,	Mexico.
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.
Buchanan,	J. W. & Jno. D. Strong & J. C. Hedenberg,	St. Joseph.

**MISSOURI**—*Continued.*

County.	Name.	Post Office.
Butler,	Snoddy & Matthews,	Poplar Bluff.
Caldwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Carroll,	B. D. Lucas,	Carrollton.
Chariton,	Chas. A. Winslow,	Brunswick.
Clay,	John T. Chandler,	Liberty.
Clinton,	Chas. A. Wright,	Plattsburg.
Cole,	E. S. King & Bro.,	Jefferson City.
Cooper,	John Cosgrove,	Boonville.
Daviess,	Richardson & Ewing,	Gallatin.
DeKalb,	Samuel C. Loring,	Maysville.
Dent,	G. S. Duckworth,	Salem.
Franklin,	John H. Pugh,	Union.
Gentry,	I. P. Caldwell,	Albany.
Greene,	J. Randolph Cox,	Springfield.
Grundy,	Daniel Metcalf,	Trenton.
Harrison,	D. J. Heaston,	Bethany.
Henry,	E. M. Vance,	Clinton.
Hickory,	Charles Kroff,	Hermitage.
Holt,	T. H. Parrish,	Oregon.
Iron,	J. P. Dillingham,	Ironton.
Jackson,	Holmes & Dean,	Kansas City.
Jasper,	Wm. Cloud,	Carthage.
Johnson,	N. H. Conklin,	Warrensburg.
Lafayette,	Ryland & Son,	Lexington.
Lawrence,	John T. Teel,	Mount Vernon.
Lewis,	F. W. Rash,	Monticello.
Lincoln,	McKee & Frasier,	Troy.
Linn,	A. W. Mullins,	Linneus.
Livingston,	C. H. Mansur,	Chillicothe.
McDonald,	A. H. Kennedy,	Pineville.

**MISSOURI**—*Continued.*

County.	Name.	Post Office.
Macon,	A. J. Williams,	Macon City.
Madison,	B. B. Cahoon,	Fredericktown.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isaiah Latchen,	Oakhurst.
Moniteau,	Moore & Williams,	California.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Madrid.
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
Pike,	Fagg & Dyer,	Louisiana.
Putnam,	Fred. Hyde,	Unionville.
Ralls,	E. W. Southworth,	New London.
Randolph,	Porter & Rothwell,	Huntsville.
St. Francois,	F. M. Carter,	Farmington.
St. Louis,	Lewis & Daniel,	St. Louis, 517 1-2 Chestnut street.
"	A. H. Bereman,	St. Louis, Cor. 4th and Olive streets.
Saline,	Jno. W. Bryant,	Marshall.
Scott,	J. H. Moore,	Commerce.
Stoddard,	Hicks & McKeon,	Bloomfield.

**MONTAN**

Edgerton,	W. E. Cullen,	Helena.
Madison,	Samuel Word,	Virginia City.

**NEBRASKA.**

Burt,	Carrigan & Hopewell,	Tekamah.
Cass,	Maxwell & Chapman,	Plattsmouth.
Johnson,	Charles A. Holmes,	Tecumseh.

**NEBRASKA—Continued.**

County.	Name.	Post Office.
Nemaha,	Jarvis S. Church,	Brownsville.
Otoe,	W. W. Wardell,	Nebraska.
Platte,	Leander Gerrard,	Columbus.

**NEVADA.**

Humboldt,	Patrick H. Harris,	Unionville.
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**NEW HAMPSHIRE.**

Cheshire,	E. M. Forbes,	Winchester.
Hillsboro',	G. Y. Sawyer & Sawyer Junior,	Nashua.

**NEW JERSEY.**

Cumberland,	Alex. H. Sharpe,	Millville.
Essex,	John W. Taylor,	Newark.
Hudson,	Jos. F. Randolph, Bennington F.	
	Randolph & Jos. F. Randolph,	Jersey City.
Hunterdon,	Alex. Wurts,	Flemington.
Mercer,	Leroy H. Anderson,	Princeton.
Middlesex,	James H. Van Cleef,	New Brunswick.
Monmouth,	Charles Haight,	Freehold.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Long,	Somerville.
Sussex,	Robert Hamilton,	Newton.
Warren,	J. G. Shipman,	Belvidere.

**NEW YORK.**

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicotville.



**NEW YORK—Continued.**

County.	Name.	Post Office.
Cayuga,	C. W. Haynes,	Port Byron.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabethtown.
Franklin,	Horace A. Taylor,	Malone.
Fulton,	J. A. Marshall,	Gloversville.
Genessee,	J. G. Johnson,	Batavia.
Greene,	Bufus W. Watson,	Cattskill,
Lewis,	Edward A. Brown, Jr.,	Lowville.
Livingston,	Geo. W. Daggett,	Nunda.
Monroe,	H. & G. H. Humphrey,	Rochester.
Montgomery,	J. D. & F. F. Wendell,	Fort Plain.
New York,	Broome & Broome,	New York, 10 Wall Street.
“	Morrison, Lanterbach & Spingarn,	New York, 200 Broadway.
Ontario,	Metcalf & Field,	Canandaigua.
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	Merritt King,	Newfield.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

**NORTH CAROLINA.**

Anson,	R. Tyler Bennett,	Wadesboro.
Bertic,	James L. Mitchell,	Windsor.

**NORTH CAROLINA—Continued.**

County.	Name.	Post Office.
Buncombe.	A. T. & T. F. Davidson,	Ashville.
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.
Carteret,	John M. Perry,	Beaufort.
Catawba,	John F. Murrill,	Hickory Tavern,
“	John B. Hussy,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
Columbus,	J. W. Ellis,	Whiteville.
Cumberland,	Charles W. Broadfoot,	Fayetteville.
Currituck,	P. H. Morgan,	Indian Ridge.
Edgecomb,	W. H. Johnston,	Tarboro.
Greene,	W. J. Rasberry,	Snow Hill
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Halifax C. H.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Jackson,	James R. Love,	Webster.
Lincoln,	W. P. Bynum,	Lincolnton.
McDowell,	W. H. Malone,	Marion.
Mecklenburg,	R. D. Osborne,	Charlotte.
New Hanover,	Abbott & Cantwell,	Wilmington.
Onslow,	Richard W. Nixon,	Jacksonville.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth City.
Perquimans,	J. M. Albertson,	Hertford.
Pitt,	T. C. Singletary,	Greenville.
Richmond,	Gilbert M. Patterson,	Laurenborg.
Rockingham,	Reid & Settle,	Wentworth.
Rowan,	Blackmer & McCorkle,	Salisbury.
Sampson,	Milton C. Richardson,	Clinton.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.

**NORTH CAROLINA—Continued.**

County.	Name.	Post Office.
Warren,	R. Pritchard,	Warrenton.
Washington,	Edmund W. Jones,	Plymouth.
Yadkin,	John A. Hampton,	Hamptonville.

**O H I O.**

Adams,	F. D. Bayless,	West Union,
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapaconeta.
Belmont,	M. D. King,	Barnesville.
Brown,	Baird & Young,	Ripley.
Carroll,	C. W. Newell,	Carrolton.
Clinton,	J. M. Kirk,	Wilmington.
Columbiana,	Henry C. Jones,	Salem.
Crawford,	Thos. Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington C. H.
Franklin,	John G. McGuffey,	Columbus.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randell,	Cincinnati.
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Logan,	Kernan & Kernan,	Bellefontaine.
Lucas,	Haynes & Price,	Toledo.
Mahoning,	Landon Masten,	Canfield,

**O H I O**—*Continued.*

County.	Name.	Post Office.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Coddington,	Medina.
Meigs,	J. & J. P. Bradbury,	Pomeroy.
Miami,	W. S. Thomas,	Troy.
Montgomery,	J. A. McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnelsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville,
Pike,	J. J. Green,	Waverly.
Sandusky,	Jno. Elwell,	Fremont.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Schaefer,	Canton.
Tuscarawas,	A. L. Neely,	New Philadelphia.
Union,	Porter & Sterling,	Marysville.
Washington,	Knowles, Alban & Hamilton,	Marietta.

**O R E G O N .**

Benton,	John Burnett,	Corvallis.
Clackamas,	L. O. Sterns,	Baker City.
Douglas,	W. R. Willis,	Roseburg.
Marion,	Chester N. Terry,	Salem.

**P E N N S Y L V A N I A .**

Alleghany,	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.

**PENNSYLVANIA—Continued.**

County.	Name.	Post Office.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Chester,	Alfred P. Reid,	West Chester.
Clarion,	David Lawson,	Clarion.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
Dauphin,	I. M. McClure,	Harrisburg.
Elk,	George A. Rathburn,	Ridgeway.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	McDowell & Litman,	Uniontown.
Indiana,	J. N. Banks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Mercer,	Griffith & Mason,	Mercer.
Montour,	Isaac X. Grier,	Danville,
Northampton,	M. Hale Jones,	Easton.
Perry,	Lewis Potter,	New Bloomfield.
Philadelphia,	Wm. Henry Rawle,	Philadelphia. <small>710 Walnut Street.</small>
Pike,	John Nyce,	Milford.
Schuylkill,	J. W. Ryan,	Pottsville.
Somerset,	Samuel Gaither,	Somerset.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

**SOUTH CAROLINA.**

Abbeville,	Thomas Thompson,	Abbeville C. H.
Anderson,	J. S. Murray,	Anderson C. H.
Barnwell,	John J. Maher,	Barnwell.

**SOUTH CAROLINA—Continued.**

County.	Name.	Post Office.
Beaufort,	Colcock & Hutson,	Pocotaligo.
Charleston,	Memminger, Pinckney & Jervcy,	Charleston.
Chesterfield,	W. L. T. Prince,	Cheraw.
Clarendon,	Haynsworth, Fraser & Barron,	Manning.
Colleton,	Williams & Fox,	Waterboro.
Darlington,	McIver & Boyd,	Darlington C. H.
Edgefield,	Thomas P. Magrath,	Edgefield C. H.
Fairfield,	James H. Rion,	Winnsboro.
Greenville,	Earle & Blythe,	Greenville.
Kershaw,	Kershaw & Kershaw,	Camden,
Lancaster,	W. A. Moore,	Lancaster,
Laurens,	S. & H. L. McGowan,	Laurens C. H.
Marlborough,	Hudson & Newton,	Bennetsville.
Orangeburg,	W. J. De Treville,	Orangeburg.
Pickens,	Whitner Symmes,	Walhalla.
Spartansburg,	J. M. Elford,	Spartanburg.
Sumter,	Richardson & Son,	Sumter.
Union,	Robert W. Shand,	Union.
Williamsburg,	Barron & Gilland,	Kingstree.

**T E N N E S S E E .**

Bedford,	H. L. & R. B. Davidson,	Shelbyville.
Benton,	W. F. Doherty,	Camden.
Bledsoe,	S. B. Northrup,	Pikeville.
Blount,	Sam. P. Rowan,	Marysville.
Bradley,	J. N. Aiken,	Charleston.
Cannon,	Burton & Wood,	Woodbury.
Carter,	W. C. Emmert,	Elizabethton.
Carroll,	James P. Wilson,	Huntington.
Cheatham,	L. J. Lowe,	Ashland City.

**T E N N E S S E E**—*Continued.*

County.	Name.	Post Office.
Claiborne,	Robert F. Patterson,	Tazewell.
Cocke,	McSween & Son,	Newport.
Davidson,	Reid & Brown,	Nashville.
Decatur,	G. W. Walters,	Decaturville.
DeKalb,	Nesmith & Bro.,	Smithville.
Dickson,	R. M. Baldwin,	Charlotte.
Dyer,	A. P. Hall,	Dyersburg.
Fentress,	A. M. Garrett,	Jamestown.
Franklin,	Newman & Turney,	Winchester.
Gibson,	G. H. Hall,	Trenton.
Giles,	James & W. H. McCallum,	Pulaski.
Grundy,	James W. Bouldin,	Altamont.
Hamilton,	M. H. Clift,	Chattanooga.
Hardin,	John A. Pitts,	Savannah.
Hardeman,	Hill & Hardin,	Bolivar.
Hawkins,	A. A. Kyle,	Rogersville.
Haywood,	H. B. Folk,	Brownsville.
Henderson,	J. W. G. Jones,	Lexington.
Henry,	J. N. Thomason,	Paris.
Hickman,	O. A. Nixon,	Centreville.
Humphreys,	H. M. McAdoo,	Waverly.
Jackson,	R. A. Cox,	Gainesboro.
Johnson,	Thomas S. Smyth,	Taylorsville.
Knox,	John Baxter,	Knoxville.
Lauderdale,	Wilkinson & Wilkinson,	Ripley.
Lincoln,	Bright & Sons,	Fayetteville.
Macon,	M. N. Alexander,	Lafayette.
Marion,	Amos L. Griffith,	Jasper.
Marshall,	James H. & Thomas F. Lewis,	Lewisburg.
Maury,	Thomas & Barnett,	Columbia.
Meigs,	V. C. Allen,	Decatur.

**T E N N E S S E E**—*Continued.*

County.	Name.	Post Office.
Montgomery,	W. A. Quarles,	Clarksville.
“	John P. Campbell,	“
Monroe,	Staley & McCrosky,	Madisonville.
McMinn,	Briant & Richmond,	Athens.
McNairy,	James F. McKinney,	Purdy.
Obion,	J. G. Smith,	Troy.
Overton,	A. F. Capps,	Livingston.
Perry,	James L. Sloan,	Linden.
Polk,	John C. Williamson,	Benton.
Puinam,	H. Denton,	Cookeville.
Roane,	Samuel L. Childress,	Kingston.
Robertson,	Wm. M. Hart,	Springfield.
Rutherford,	Ridley & Ridley,	Murfreesboro.
Sevier,	G. W. Pickle,	Sevicerville.
Shelby,	W. A. Dunlap,	Memphis.
“	H. Townsend,	<small>Cor. Madison &amp; 2d Streets.</small> Memphis.
Smith,	E. W. Turner,	Carthage.
Sullivan,	W. D. Haynes,	Blountville.
Stewart,	J. M. Scarborough,	Dover.
Tipton,	Peyton I. Smith,	Covington.
Warren,	John L. Thompson,	McMinnville.
Washington,	P. P. C. Nelson,	Johnson Depot.
Wayne,	R. P. & Z. M. Cypert,	Waynesboro.
Weakley,	W. P. Caldwell,	Gardner.
“	Charles M. Ewing,	Dresden.
White,	W. M. Simpson,	Sparta.
Williamson,	Hicks & Magness,	Franklin.
Wilson,	Tarver & Gollady,	Lebanon.



**T E X A S.**

County.	Name.	Post Office.
Anderson,	J. N. Garner,	Palestine.
Angelina,	H. G. Lane,	Homer.
Atascosa,	W. H. Smith,	Pleasanton.
Austin,	Ben. T. & Charles A. Harris,	Bellville.
Bell,	McGinnis & Lowry,	Belton.
Bexar,	Thomas M. Paschal,	San Antonio.
Bosque,	Henry Fossett,	Meridian.
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbia.
Brazos,	John Henderson,	Bryan,
Burk,	James H. Jones,	Henderson.
Burleson,	A. W. McIver,	Caldwell.
Caldwell,	Nix & Storey,	Lockhart.
Calhoun,	John S. Givens,	Indianola.
Cooke,	Weaver & Bordeaux,	Gainesville.
Dallas,	John M. Crockett,	Dallas.
Ellis,	H. H. Sneed,	Waxahatchie.
Falls,	T. P. & B. L. Aycock,	Martin.
Fannin,	Roberts & Semple,	Bonham.
Fayette,	Moore & Ledbetter,	Lagrange.
Fort Bend,	B. J. Calder,	Richmond.
Freestone,	Theo. G. Jones,	Fairfield.
Gonzales,	Harwood & Conway,	Gonzales.
Grayson,	Woods & Cowles,	Sherman.
Guadalupe,	Washington E. Goodrich,	Seguin.
Harris,	Crosby & Hill,	Houston.
Harrison,	J. B. Williamson,	Marshall.
Henderson,	P. T. Tannehill,	Athens.
Hill,	Wm. B. Tarver,	Hillsboro.
Houston,	D. A. Nunn,	Crockett,
Hunt,	Sam. Davis,	Greenville.

**T E X A S**—*Continued.*

County.	Name.	Post Office.
Jack,	Thomas Ball,	Jacksboro.
Jasper,	Moulton & Doom,	Jasper.
Jefferson,	J. K. Robertson,	Beaumont.
Karnes,	L. S. Lawhon,	Helena.
Kaufman,	Manion, Huffmaster & Adams,	Kaufman.
Kerr,	R. F. Crawford,	Kerrsville.
Lamar,	S. B. Maxey,	Paris.
Lavaca,	H. R. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
McLennan,	Flint, Chamberlin & Graham,	Waco.
Marion,	Crawford & Crawford,	Jefferson,
Milam,	C. R. Smith,	Cameron.
Montague,	W. H. Grigsby,	Montague.
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Corsicana.
Newton,	John T. Stark,	Newton.
Nueces,	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Polk,	J. M. Crosson,	Livingston.
Red River,	W. B. Wright,	Clarksville.
Refugio,	Wm. W. Dunlap,	Rockport.
Robertson,	F. A. Hill,	Calvert.
Sabine,	J. M. Watson,	Hemphill.
San Augustine,	S. B. Bewley,	San Augustine.
Smith,	R. E. House,	Tyler.
Tarrant,	Hendricks & Smith,	Fort Worth.
Titus,	Henry Dillahunty,	Mount Pleasant.
Travis,	Chandler & Carleton,	Austin.
"	Hancock & West,	"
Trinity,	S. S. Robb,	Sumpter.
Upsher,	J. L. Camp,	Gilmer.

**TEXAS**—*Continued.*

County.	Name.	Post Office.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Phillips, Lackey & Stayton,	Victoria.
Williamson,	Coffee & Henderson,	Georgetown.
Wise,	J. W. Booth,	Decatur.
Wood,	J. J. Jarvis,	Quitman.

**UTAH.**

Great Salt Lake,	Fitch & Mann,	Salt Lake City.
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**VERMONT.**

Caledonia,	Belden & May,	St. Johnsbury.
Rutland,	J. Prout,	Rutland.

**VIRGINIA.**

Accomack,	Gunter & Gillet,	Accomack C. H.
Albemarle,	Blakey & Rierson,	Charlottesville.
Alexandria,	Ball & Mushbach,	Alexandria.
Augusta,	Effinger & Craig,	Staunton.
Buckingham,	N. F. Bocock,	Buckingham.
Campbell,	Wm. & John Daniel,	Lynchburg.
Caroline,	Washington & Chandler,	Bowling Green.
Charlotte,	Thomas E. Watkins,	Charlotte C. H.
Culpepper,	Gibson & Alcocke,	Culpepper.
Dinwiddie,	Mann & Stringfellow,	Petersburg.
Fairfax,	H. W. Thomas,	Fairfax C. H.
Fluvanna,	Wm. B. Pettit,	Palmyra,
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
Gloucester,	J. T. & J. H. Seawell,	Gloucester.
Greene,	R. S. Thomas,	Stanardsville.

**VIRGINIA**—*Continued.*

County.	Name.	Post Office.
Greenville,	W. S. Goodwyn,	Hicksford.
Hanover,	W. R. Winn,	Ashland.
Henrico,	George L. Christian,	Richmond.
“	Wm. J. Clopton,	“
James City,	R. H. Armistead,	Williamsburg.
King William,	B. B. Douglas,	Ayletts,
Lancaster,	B. H. Robinson,	Lancaster.
Lee,	David Miller,	Jonesville.
Loudon,	John M. Orr,	Leesburg.
Matthews,	T. J. Christian,	Matthews C. H.
Mecklenburg,	Chambers, Goode & Baskerville,	Boydton.
Middlesex,	Robert L. Montague,	Saluda.
Montgomery,	John J. Wade,	Christianburg.
Nansemond,	John R. Kilby,	Suffolk.
Nelson,	Thomas P. Fitzpatrick,	Arrington.
New Kent,	John P. Pierce,	New Kent C. H.
Norfolk,	Hinton, Goode & Chaplain,	Norfolk.
Nottoway,	Wm. R. Bland,	Wellville.
Page,	Richard S. Parks,	Luray.
Pittsylvania,	Reed & Bouldin,	Danville.
Prince Edward,	Berkeley & Berkeley,	Farnville.
Pulaski,	Lewis A. Buckingham,	Snowville.
Roanoke,	Strouse & Marshall,	Salem.
Rockbridge,	D. E. & J. H. Moore,	Lexington.
Rockingham,	George G. Grattan,	Harrisonburg.
Scott,	E. F. Tiller,	Estillville.
Smyth,	Gilmore & Derrick,	Marion.
Southampton,	J. H. & J. B. Prince,	Jerusalem.
Spottsylvania,	Marye & Fitzhugh,	Fredericksburg
Surrey,	George T. Clarke,	Bacon's Castle.

**VIRGINIA**—*Continued.*

County.	Name.	Post Office.
Washington,	Frank A. Humes,	Abingdon.
Wythe,	Terry & Pierce,	Wytheville.

**WASHINGTON TERRIORTY.**

Jefferson,	B. F. Dennison,	Port Townsend.
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**WEST VIRGINIA.**

Berkeley,	Blackburn & Lamon,	Martinsburg.
Cabell,	B. F. Curry,	Hamlin.
Fayette,	Theophilus Gaines,	Fayette C. H.
Greenbrier,	Mathews & Mathews,	Lewisburg.
Hardy,	Allen & Sprigg,	Moorefield.
Harrison,	Gideon D. Camden,	Clarksburg,
Jackson,	Henry C. Flesher,	Jackson C. H.
Jefferson,	Jo. Mayse,	Charleston.
Kanawha,	McWhorter & Freer,	Charleston.
Mason,	W. H. Tomlinson,	Point Pleasant.
Mineral,	George A. Tucker,	Piedmont.
Monongalia,	Willey & Son,	Morgantown.
Morgan,	J. Rufus Smith,	Berkeley Springs.
Ohio,	W. V. Hoge,	Wheeling.
Pocahontas,	D. A. Stofer,	Huntersville.
Preston,	G. Cresap,	Kingwood.
Raleigh,	Martin H. Holt,	Raleigh C. H.
Randolph,	David Goff,	Beverly.
Roane,	J. G. Schilling,	Spencer.
Upsher,	W. G. L. Totten,	Buckhannon.

**W I S C O N S I N .**

County.	Name.	Post Office.
Adams,	O. B. Lapham,	Friendship,
Brown,	Hastings & Greene,	Green Bay,
Clark,	Robert J. McBride,	Neillsville.
Dane,	Vilas & Bryant,	Madison.
Door,	D. A. Reed,	Sturgeon Bay.
Eau Claire,	Wm. Pitt Bartlett,	Eau Claire.
Grant,	Bushnell & Clark,	Lancaster.
Green,	Dunwiddie & Bartlett,	Monroe.
Green Lake,	John C. Truesdell,	Princeton.
Iowa,	George L. Frost,	Dodgeville.
Juneau,	R. A. Wilkinson,	Mauston.
Kenosha,	J. J. Pettit,	Kenosha.
LaFayette,	George A. Marshall,	Darlington.
Marquette,	Wm. H. Peters,	Montello.
Portage,	James O. Raymond,	Plover.
Racine,	George B. Judd,	Racine.
Richland,	Eastland & Eastland,	Richland Centre.
St. Croix,	J. S. Moffatt,	Hudson.
Sauk,	Howard J. Huntington,	Baraboo.
Walworth,	H. F. Smith,	Elkhorn.
Washington,	Frisby & Weil,	West Bend.

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# THE SOUTHERN LAW REVIEW.

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VOL. I.]

NASHVILLE, JULY, 1872.

[No. 3.]

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## *Autobiographical Sketch of Chancellor Kent.*

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We are indebted to R. McPhail Smith, of the Nashville Bar, for the following very interesting fragment of autobiography which is now published for the first time. It is from the pen of no less a personage than Chancellor Kent. The history of it is as follows: In the year 1828, the late Thomas Washington, one of the most eminent of the Bar of Tennessee, and a warm admirer of Chancellor Kent, wrote to the latter, enclosing a very elaborate argument of his own, and requesting to be favored with a familiar account of his life, studious habits, etc. This request was complied with. The letter containing the desired autobiographical sketch was at different times shown by Mr. Washington to several of his professional brethren, and among others to Return J. Meigs, John M. Lea, and John Trimble. Mr. Smith first heard of the document from Mr. Trimble, who related in conversation Chancellor Kent's description of the manner in which he was accustomed to make up his judgments. Afterwards, upon mentioning this to Mr. Meigs, in Washington, D. C. where he now resides, Mr. Smith was informed by him that he had retained a copy of the letter in question, which, however, he could not just then conveniently lay his hand upon. Subsequently, at the urgent request of Mr. Smith, the copy, having been found in the meantime, was mailed to him at Nashville, who copied it accurately before returning it;

and Mr. Smith's copy of Mr. Meigs's copy of the original letter of Chancellor Kent to Mr. Washington, is now laid before the reader.

Since this letter was written, nearly half a century has rolled by, and every person therein alluded to has passed away. The letter was written in a spirit of entire unreserve, implying the absence of any idea in the mind of the writer of its ever being made public; but the contents are not such as to render its publication at all improper. Chancellor Kent is one of the brightest stars in the firmament of American jurisprudence, and he was hardly more distinguished for pre-eminent ability than for the simplicity, purity, and elevation of his character; and everything nearly relating to him is matter of profound and general interest, at least to the legal profession; and this delightful narrative from his own pen ought not to be permitted to die.

Mr. Smith informs us that a friend, formerly one of the ablest and most accomplished of our state judiciary, and now hardly less useful and influential in private life, who had read the original of the letter in question, said to him that while upon the bench he often recalled Chancellor Kent's statement of the manner in which he formed his judicial opinions, and that from the recollection thereof he derived additional impulse to act in the same spirit.

Upon the arrival of the news of Chancellor Kent's decease in December, 1847, there was a meeting of the members of the Bar of the middle division of the state, then in attendance upon the Supreme Court, to adopt resolutions appropriate to the occasion. The preamble and resolutions adopted, which are prefixed to the 8th volume of Humphrey's Reports, flowed from the eloquent pen of Thomas Washington. We give the letter aforesaid, without further remark:

NEW YORK, October 6, 1828.

*Dear Sir:* Your very kind letter of the 15th ult. was duly received, and also your argument in the case of *Ivey vs. Pinson*. I have read the pamphlet with much interest and pleasure. It is composed with masterly ability. Of this there can be no doubt; and without presuming to give any opinion on a great case still *sub judice*, and only argued before me on one side, I beg leave to express my highest respect for the law, reasoning, and doctrine of the argument, and my admiration of the spirit and eloquence which animate it. My attention was very much fixed on the perusal; and if there be any lawyer in this state who can write a better argument in any point of view, I have not the honor of his acquaintance.

As to the rest of your letter, concerning my life and studies, I hardly know what to say or do. Your letter and argument and character and name, have impressed me so favorably that I feel every disposition to oblige you if it be not too much at my own expense. My attainments are of too ordinary a character, and far too limited, to provoke such curiosity. I have had nothing more to aid me in all my life than plain method, prudence, temperance, and steady, persevering diligence. My diligence was more remarkable for being steady and uniform than for the degree of it, which never was excessive, so as to impair my health or eyes, or prevent all kinds of innocent or lively recreation.

I would now venture to state briefly, but very frankly, and at your special desire, somewhat of the course and progress of my studious life. I know you can not but smile at times at my simplicity, but I commit myself to your indulgence and honor.

I was educated at Yale College, and graduated in 1781. I stood as well as any in my class; but the test of scholarship at that day was contemptible. I was only a very inferior classical scholar, and we were not required, and to that day I had never looked into any Greek book but the New Testament. My favorite studies were Geography, History, Poetry, Belle-Lettres, etc. When the College was broken up and dispersed in July, 1779, by the British, I retired to a country village; and finding Blackstone's Commentaries, I read the four volumes. Parts of the work struck my taste, and the work inspired me at the age of sixteen with awe, and I fondly determined to be a lawyer. In November, 1781, I was placed by my father with Mr. (now called Judge) Benson, who was then Attorney General at Poughkeepsie, on the banks of the Hudson, and in my native county of Dutchess. Here I entered on law, and was the most modest, steady, industrious, student that such a place ever saw. I read the following works: Grotius and Puffendorf, in large folios, and made copious extracts. My fellow students, who were more gay and gallant, thought me very odd and dull in my taste; but out of five of them four died in middle life drunkards. I was free from all dissipation, and chaste as pure, virgin snow. I had never danced, or played cards, or sported with a gun, or drank anything but water. In 1782 I read Smollett's History of England, and procured at a farmer's house, where I boarded, Rapin's, (a huge folio) and read it through, and I found during the course of the last summer among my papers my MS. abridgement of Rapin's dissertation on the laws

and customs of the Anglo Saxons. I abridged Hale's History of the Common Law, and the old books of Practice, and read parts of Blackstone again and again. The same year I procured Hume's History of England, and his profound reflections and admirable eloquence struck most deeply on my youthful mind. I extracted the most admired parts, and made several volumes of MS. I was admitted to the Bar of the Supreme Court in January, 1785, at the age of twenty-one, and then married *without one cent of property*; for my education exhausted all my kind father's resources, and left me in debt \$400, which it took me two or three years to discharge. Why did I marry? I answer,—at the farmer's house where I boarded, one of his daughters, a little, modest, lovely girl of fourteen, gradually caught my attention, and insensibly stole upon my affections; and before I thought of love, or knew what it was, I was most violently affected. I was twenty-one, and my wife sixteen, when we married; and that *charming and lovely girl* has been the idol and solace of my life, and is now with me in my office, unconscious that I am writing this concerning her. We have both had uniform health and the most perfect and unalloyed domestic happiness, and are both as well now, and in as good spirits, as when we married. We have three adult children. My son lives with me, and is twenty-six, and a lawyer of excellent sense and discretion, and of the purest morals. My eldest daughter is well married, and lives the next door to me, and with the intimacy of one family. My youngest daughter is now of age, and lives with me, and is my little idol.

I went to housekeeping at Poughkeepsie in 1786, in a small snug cottage, and there I lived in charming simplicity for eight years. My practice was just about sufficient to redeem me from debt, and to maintain my wife and establishment decently, and to supply me with books about as fast as I could read them. I had neglected, and almost entirely forgotten, my scanty knowledge of the Greek and Roman classics, and an accident turned my attention to them very suddenly. At the———in 1786, I saw E. Livingston (now the codifier for Louisiana), and he had a pocket Horace, and read some passages to me at some office, and pointed out their beauties, assuming that I well understood Latin. I said nothing, but was stung with shame and mortification; for I had forgotten even my Greek letters. I purchased immediately Horace and Virgil, a dictionary and grammar, and the Testament, and formed my resolution promptly and decidedly to recover the lost languages.

I studied in my little cottage mornings, and dedicated one hour to Greek and another to Latin daily. I soon increased it to two for each tongue in the twenty-four hours. My acquaintance with the languages increased rapidly. After I had read Horace and Virgil, I turned to Livy for the first time in my life; and after I had construed the Greek Testament, I took up the *Iliad*, and I can hardly describe to this day the enthusiasm with which I perseveringly read and studied in the originals, Livy and the *Iliad*. It gave me inspiration. I purchased a French dictionary and grammar, and began French, and gave an hour to that language daily. I appropriated the business part of the day to law, and read Coke Lyttleton. I made copious notes. I devoted evenings to English literature, in company with my wife. From 1788 to 1798, I steadily devoted the day into five parts, and allotted them to Greek, Latin, law and business, and French and English varied literature. I mastered the best of the Greek, Latin and French classics, as well as the best French and English law books at hand. I read Machiavel and all the collateral branches of English history, such as Littleton's Henry the second, Bacon's Henry the seventh, Lord Clarendon on the Great Rebellion, etc. I even sent to England as early as 1790, for Warburton's *Divine Legation* and the *Lusiad*.

My library, which started from nothing, grew with my growth, and it has now attained to upwards of 3,000 volumes; and it is pretty well selected, for there is scarcely a work, authority or document, referred to in the three volumes of my commentaries, but what has a place in my own library. Next to my wife, my library has been the source of my greatest pleasure and devoted attachment.

The year 1793 was another era in my life. I removed from Poughkeepsie to the city of New York, with which I had become well acquainted; and I wanted to get rid of the encumbrance of a dull law partner at Poughkeepsie. But, though I had been in practice nine years, I had acquired very little property. My furniture and library were very scanty, and I had not \$500 extra in the world. But I owed nothing, and came to the city with a good character, and with a scholar's reputation. My newspaper writings and speeches in the Assembly had given me some notoriety. I do not believe any human being ever lived with more pure and perfect domestic repose and simplicity and happiness than I did for these nine years.

I was appointed Professor of Law in Columbia College late in

1793, and this drew me to deeper legal researches. I read that year in the original Bynkershoek, Quinctilian, and Cicero's rhetorical works, besides reporters and digest, and began the compilation of law lectures.

I read a course in 1794-5 to about forty gentlemen of the first rank in the city. They were very well received, but I have long since discovered them to have been slight and hasty productions. I wanted judicial labors to teach me precision. I dropped the course after one term, and soon became considerably involved in business; but was never fond of, nor much distinguished in, the contentions of the bar.

I had commenced in 1786 to be a zealous Federalist. I read every thing on politics. I got the Federalist almost by heart, and became intimate with Hamilton. I entered with ardor into the Federal politics against France in 1793; and my hostility to the French democracy, and to French power, beat with strong pulsation down to the battle of Waterloo. Now you have my politics.

I had excellent health, owing to the love of simple diet, and to all kinds of temperance, and never read late at night. I rambled daily with my wife over the hills. We were never asunder. In 1795 we made a voyage through the lakes—George and Champlain. In 1797 we ran over the six New England States. As I was born and nourished in boyish days among the Highlands east of the Hudson, I have always loved rural and wild scenery; and the sight of mountains, hills, woods, and streams, always enchanted me, and does still. This is owing, in part, to early association, and it is one secret of my uniform health and cheerfulness. In 1790 I began my official life. It came upon me entirely unsolicited and unexpected. In February, 1790, Governor Jay wrote me a letter stating that the office of Master in Chancery was vacant, and wished to know confidentially whether I would accept. I wrote a very respectful, but very laconic, answer. It was that I was content to accept of the office if appointed. The same day I received the appointment, and was astonished to learn that there were sixteen professed applicants, all disappointed. This office gave me almost a monopoly of the business, for there was but one other Master in New York. The office kept me in petty details and out-door concerns, but was profitable. In March, 1797, I was appointed Recorder of New York. This was done at Albany, and without my knowledge that the office was even vacant, or expected to be. The first I heard of it was the appoint-



ment announced in the papers. This was very gratifying to me, because it was a judicial office, and I thought it would relieve me from the drudgery of practice, and give me a way of displaying what I knew, and of being useful entirely to my taste. I pursued my studies with increased application, and enlarged my law library very much. But I was overwhelmed with office business, for the Governor allowed me to retain the other office also, and with these joint duties, and counsel business in the Supreme Court, I made a great deal of money that year. In February, 1798, I was offered by Gov. Jay, and accepted, the office of youngest Judge of the Supreme Court. This was the summit of my ambition. My object was to retire back to Poughkeepsie, and resume my studies, and ride the circuits, and inhale the country air, and enjoy *otium cum dignitate*. I never dreamed of volumes of reports and written opinions: such things were not then thought of. I retired back to Poughkeepsie in the spring of 1798, and in that summer rode over the western wilderness, and was delighted. I returned home, and began my Greek and Latin, French, English, and law classics as formerly, and made wonderful progress in books that year.

In 1799 I was obliged to move to Albany, in order that I might not be too much from home; and there I remained stationary for twenty-four years.

When I came to the bench there were no reports or state precedents. The opinions from the bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was. I first introduced a thorough examination of cases, and written opinions. In January, 1799, the second case reported in 1st Johnson's Cases, of *Ludlow vs. Dale*, is a sample of the earliest. The Judges when we met all assumed that foreign sentences were only good *prima facie*. I presented and read my written opinion, that they were conclusive, and they all gave up to me, and so I read it in court as it now stands. This was the commencement of a new plan, and then was laid the first stone in the subsequently erected temple of our jurisprudence. Between that time and 1804 I rode my share of circuits, and attended all the terms, and was never absent, and was always ready in every case by the day.

I read, in that time, Vattel and Emerigon, and completely abridged the latter, and made copious digests of all the new English reports and treatises as they came out. I made much use of the



Corpus Juris, and as the Judges (Livingston excepted) knew nothing of French or civil law, I had an immense advantage over them. I could generally put my brethren to rout, and carry my point, by my mysterious wand of French and civil law. The Judges were Republicans, and very kindly disposed to everything that was French; and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities, and thereby enrich our commercial law. I gradually acquired proper directing influence with my brethren, and the volumes in Johnson, after I became Judge in 1804, show it. The first practice was for each Judge to give his portion of the opinions when we all agreed, but that gradually fell off, and for the two or three last years before I left the bench, I gave the most of them. I remember that in 8th Johnson all the opinions for one term are "*Per Curiam*." The fact is, I wrote them all, and proposed that course to avoid exciting jealousy; and many "*Per Curiam*" opinions are inserted for that reason.

Many of the cases decided during the sixteen years I was in the Supreme Court were labored by me most unmercifully; but it was necessary, under the circumstances, to subdue opposition. We had but few American precedents, our Judges were Democratic, and my brother SPENCER particularly, of a bold, vigorous, dogmatic mind, and overbearing manner. English authorities did not stand very high in these feverish times, and this led me a hundred times to attempt to bear down opposition, or shame it, by exhausting research and overwhelming authority. Our jurisprudence was probably on the whole improved by it. My mind certainly was roused, and was always kept ardent and inflamed by collision.

In 1814 I was appointed Chancellor. The office I took with considerable reluctance. It had had no charms. The person who left it was stupid; and it is a curious fact that, for the nine years I was in that office, there was not a single decision, opinion, or dictum of either of my predecessors,—Livingston and Lansing, from 1777 to 1814, cited to me, or even suggested. I took the court as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English chancery practice and jurisdiction as I thought applicable under our Constitution.

This gave me grand scope; and I was only checked by the revision of the Senate as a Court of Errors. I opened the gates of the

court immediately, and admitted, almost gratuitously, the first year, eighty-five counsellors; though I found there had not been but thirteen admitted for thirteen years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Chancery Reports.

My course of study in equity-jurisprudence was very confined to the topic elicited by the cases. I had previously read, of course, the modern equity reports down to the time; and, of course, I read all the new ones as fast as I could procure them. I remember reading Peer Williams's as early as 1792, and I made a digest of the leading doctrines. The business of the Court of Chancery oppressed me very much, but I took my daily exercise, and my daily delightful country rides among the Catskill or the Vermont mountains, with my wife, and I kept up my health and spirits. I always took up the cases in their order, and never left one until I had finished it. This was only doing one thing at a time. My practice was first to make myself perfectly and accurately (mathematically accurately) acquainted with the facts. It was done by abridging the bill and the answers, and then the depositions; and, by the time I had done this slow and tedious process, I was master of the case, and ready to decide it. I saw where justice lay, and the moral sense decided the case half the time. And then I sat down to search the authorities until I had exhausted my books; and I might, once in a while, be embarrassed by a technical rule, but I almost always found principles suited to my views of the case, and my object was so to discuss the point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel.

During these years at Albany I read a great deal of English literature, but not with the discipline of my former division of time. The avocations of business would not permit it. I had dropped the Greek, as it hurt my eyes. I persevered in Latin, and used to read Virgil, Horace, and some of them, annually. I have read Juvenal, Horace, and Virgil, eight or ten times. I read a great deal in Pothier's works, and always consulted him when applicable. I read the Edinburgh and Quarterly Reviews and American Registers *ab initio* and thoroughly, and voyages and travels, and the Waverly Novels, etc. as other folks did. I have always been excessively fond of voyages and travels.

In 1823 a solemn era in my life had arrived. I retired from the office at the age of sixty, and then immediately, with my son, visited the Eastern States. On my return, the solitude of my private office and the new dynasty did not please me. I besides would want income to live as I had been accustomed. My eldest daughter was prosperously settled in New York, and I resolved to move away from Albany, and ventured to come down to New York, and be chamber counsel; and the Trustees of Columbia College immediately tendered me again the old office of Professor, which had been dormant from 1795. It had no salary, but I must do something for a living, and I undertook (but exceedingly against my inclination) to write and deliver law lectures. In the two characters of chamber counsel and college lecturer, I succeeded by steady perseverance beyond my most sanguine expectations; and, upon the whole, the five years I have lived here in this city since 1823, have been happy and prosperous. I have introduced my son into good business, and I live aside of my daughter, and take excursions every summer with my wife and daughter all over the country. I have been twice with them to Canada, and we go in every direction. I never had better health. I walk the Battery uniformly before breakfast. I give a great many written opinions; and, having got heartily tired of lecturing, I abandoned it, and it was my son that pressed me to prepare a volume of the lectures for the press. I had no idea of publishing them when I delivered them. I wrote a new one volume and published it, as you know. This led me to remodel and enlarge, and now the third volume will be out in a few days; and I am obliged to write a fourth to complete my plan.

My reading is now, as you may suppose, quite desultory; but still I read with as much zest and pleasure as ever. I was never more engaged in my life than during the last summer. I accepted the trust of Receiver to the Franklin (insolvent) Bank, and it has occupied, and perplexed, and vexed me daily; and I had to write part of the third volume, and search books a good deal for that very object, and I have revised the proof sheets. If I had a convenient opportunity, (though I do not see how I can have one,) I would send the third volume out to you. \* \* \* \* \*

Your suggestion of an equity treatise contains a noble outline of a great and useful work; but I can not and will not enter on such a task. I have much more to lose than to gain, and I am quite tired

of equity law. I have done my part. I choose to live now at my ease, and to be prepared for the approaching infirmities of age.

On reviewing what I have written, I had thoughts of burning it. I speak of myself so entirely, and it is entirely against my habit or taste. But I see no other way fairly to meet your desires.

I am with great respect and good wishes,

Your most obedient servant,

JAMES KENT.

### *Characteristics, and Essential Requisites of Negotiable Bills and Notes.*

1 §. An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face may be transferred from one to another by indorsement and delivery by the holder, or by delivery only. The peculiarities which attach to negotiable paper are the growth of time, and were acceded for the benefit of trade.

It was a rule of the Common Law of England that a chose in action—by which is meant a claim which the holder would be driven to his action at law to recover—could not be assigned to a stranger, our forefathers conceiving that if claims and debts could be assigned, the wealthy and powerful would purchase them and sue the debtors, whereby “rights might be trodden down and the weak oppressed.” The first relaxation of this rule was made in respect to bills of exchange, and was gradually extended to notes and other securities, until the rule itself disappeared.

But while all choses in action are now transferable, the negotiable instrument is the only species which carries by transfer, a clear title and a full measure. It has then, still, two distinguishing characteristics.

*First*, Respecting the title. If a horse, or other personal chattel, or a non-negotiable instrument, be stolen, no purchaser, however innocent or ignorant of the theft, can acquire title against the true owner, who may at any place, and at any time, identify his property and reclaim it. But if a negotiable instrument be stolen, and transferred by the thief to a third person in the usual course of business, before maturity, and for a valuable consideration, the person so acquiring it may hold it against the world.

*Second*, Respecting the amount. If a bond or non-negotiable note be assigned, the assignee steps into the shoes of the assignor, and if the bond, or note, has been paid, or is subject to any counterclaim or set-off, against the original maker, they attach to and encumber it into whosoever hands it may fall. But a negotiable note carries the right to the whole amount it secures on its face, and is subject to

none of the defenses which might have been made between the original, or intervening parties, against any one who acquired it in the usual course of business before maturity. It is a circulating credit like the currency of the country, and, before maturity, the genuineness and solvency of the parties are alone to be considered in determining its value. It has been fitly termed "a courier without luggage."<sup>1</sup>

There is a single exception to these propositions, and that arises when the original consideration of the bill or note was such as the law declares void, *i. e.*, an usurious, or gaming debt. In such cases the original taint adheres to the paper wherever it goes, and utterly invalidates it.

§ 2. A Bill of Exchange is an open letter addressed by one person to a second, directing him to pay absolutely and at all events, a certain sum of money therein named, to a third person, or to any other to whom that third person may order it to be paid, or it may be payable to bearer, or to the drawer himself.

Abram, who draws the bill, is called the drawer; Benjamin, to whom it is directed, is called the drawee, and, upon accepting it, becomes the acceptor. Charles, to whom the bill is made payable, is called the payee.

If the bill be payable to "Charles *only*," he can not transfer it; but if payable to "Charles or order," he may, by indorsing it, direct that it be paid to David, and in that case Charles becomes the indorser, and David the indorsee.

§ 3. A Promissory Note, or note of hand, as it is often called, is an open engagement in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money absolutely and at all events. Abram, who makes the note, is called the maker; Benjamin, to whom the promise is made to pay, the payee; and if the note is transferred from Benjamin to Charles, they are termed respectively indorser and indorsee.

The maker of a note is sometimes termed the drawer, and in accommodation indorsements the indorser frequently writes over his name: "credit drawer." When the term "drawer" is so used, the maker is of course meant, though not accurately described.

"Holder" is a general word applied to any one in actual or constructive possession of the bill or note, and entitled at law to recover or receive its contents from the parties to it.

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<sup>1</sup>Overton vs. Tyler, 3 Barr., 346.

§ 4. In their original structure, a Bill of Exchange and Promissory note do not strongly resemble each other. In a Bill there are three original parties: Drawer, Drawee and Payee; in a Note only two: Maker and Payee. In a Bill the acceptor is the primary debtor. In a Note the maker is the only debtor. But if the note be transferred to a third party by the payee, it becomes strikingly similar to a bill. The indorser becomes then, as it were, the drawer, the maker the acceptor, and the indorsee the payee. The reader, bearing this similitude in mind, will easily be able to apply to notes the decisions hereinafter cited, concerning bills, and *vice versa*.

§ 5. Bills of Exchange are *either inland or foreign*—foreign when drawn in one State or country and made payable in another State or country, otherwise inland. In their mercantile<sup>1</sup> relations the States of the “United States” are foreign, and therefore a bill drawn in Richmond, Virginia, on a merchant of Baltimore, Maryland, is a foreign bill—that is if payable in Baltimore also, for if payable in Richmond the acceptance in Baltimore would not change its inland character.<sup>2</sup> If both drawer and drawee reside in the same State or country, and the bill be payable in another, it will be a foreign bill. Thus in the case of the *Bank U. S. vs. Daniel*, 12 Pet., 32, where the drawer and drawee resided in Kentucky, and the bill was made payable in New Orleans, the Supreme Court of the United States said “that the place of payment being in a jurisdiction *foreign* to Kentucky subjected the acceptor, James Daniel, to the performance of the contract, according to the laws of Louisiana, to every extent he would have been had he become a party to the bill at New Orleans.”

The Court of Appeals of Virginia, in *Brown vs. Ferguson*, 4 Leigh, 37, held that a bill drawn by a Baltimore merchant on a Virginia firm “was by the law merchant, a foreign bill, for as to such bills the several States of the Union are foreign to each other.”

§ 6. The distinction between foreign and inland bills is important, as the nature of the instrument determines the measure of interest and damages in case of dishonor. It is a well settled principle of law that every contract, as to its validity, nature, interpretation and effect, as they may be called the *right* in contradistinction to the *remedy*, is governed by the law of the place where it is made, unless

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<sup>1</sup> *Miller vs. Hackley*, 5 John., 375; *Duncan vs. Course*, 1 So. Car., 100; *Phoenix Bank vs. Hussey*, 12 Pick., 483; *State Bank vs. Hayes*, 3 Ind., 400; *Buckner vs. Finley*, 2 Peters., 586; *Teconic Bank vs. Stackpole*, 41 Maine, 302.

<sup>2</sup> *Amner vs. Clark*, 2 C. M. & R., 468.



it is to be performed in another place, and then it is to be governed by the law of the place where it is to be performed. Therefore, a bill or note made in one State, and payable in another, has its characteristics determined by the law of the State wherein it is to be paid.<sup>1</sup>

The mere signing a blank paper does not create a contract; and there is no contract until the blank is filled up and the instrument delivered. Accordingly, where a note was dated and signed in blank in Virginia, and then sent to Maryland, where it was filled up and completed, it was held a Maryland contract to be governed by its laws.<sup>2</sup>

§ 7. Bills of Exchange derive their peculiar properties from the custom of merchants; and, in England, Promissory Notes from statutes 3 and 4 Anne, Cap. 9, which places them on the same footing as bills.<sup>3</sup> That act, which has been copied substantially in many of the American States, grew out of the refusal of Lord Holt to recognize them as negotiable—his Lordship opposing the idea of their negotiability on the ground that “it proceeded from the obstinacy and opinionativeness of the merchants, who were endeavoring to set the law of Lombard Street above the law of Westminster Hall”: *Clerk vs. Martin*, 2 Ld. Ray’d, 757.

The peculiar liabilities which attach to parties to bills and negotiable notes grew out of the customs of the merchants, who persistently asserted them until they were fully recognized by the Courts; and the system of rules which governs mercantile contracts is termed the “Law Merchant,” deriving its name from the merchants who formed it.

<sup>1</sup> *Fant vs. Miller*, 17 Grat., 47; *Wilson vs. Lazier*, 11 Grat., 477; *Freeman’s Bank vs. Ruckman*, 16 Grat., 127; *Nichols, Ex’r., vs. Porter*, 2 Hagan, 13; *Story Conf. Laws*, §§ 242, 260, 263, 280; *Vidal vs. Thompson*, 11 Martin, 23.

<sup>2</sup> *Fant vs. Miller*, 17 Grat., 47; *Cook vs. Haffett*, 5 Howard, 295; *Lawrence vs. Bassett*, 5 Allen, 140.

<sup>3</sup> The Statute of Anne (3 and 4 Anne, c. 9) provides: “That all notes in writing that shall be made and signed by any person, &c., whereby such person, &c., shall promise to pay to any other person, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c., to whom the same is made payable; and also every such note payable to any person, &c., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland Bills of Exchange are or may be, according to the custom of merchants; and that the persons, &c., to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they, might do upon any inland



§ 8. It has been contended, however, that promissory notes were negotiable by the "Law Merchant" of England, (which was as much a part of the common law as the laws of murder or marriage,) and that the statute of Anne was only declaratory of then existing statutes which Lord Holt denied.<sup>1</sup> The question is no longer a practical one, and notwithstanding that this view is rebutted by authorities not less eminent than those which assert it, we incline to coincide with the latter.<sup>2</sup>

#### EFFECT OF A BILL OR DRAFT FOR THE WHOLE OF A PARTICULAR FUND.

§ 9. It was said in *Gibson vs. Minet*, 1 H. Bl., 569, and it has been frequently quoted, that:<sup>3</sup> "The theory of a Bill of Exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer;" and the decisions sustain this dictum as applied to accepted bills, acceptance being considered as an absolute appropriation of the amount to the payee for which the acceptor is primarily liable.<sup>4</sup>

Before acceptance, however, what is the effect of a Bill of Ex-

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Bill of Exchange, made or drawn according to the custom of merchants, against the person, &c., who signed the same; and that any person, &c., to whom such note that is made payable to any person, &c., his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action, for such sum of money, either against the person, &c., who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland Bills of Exchange."

<sup>1</sup>*Irvin vs. Maury*, 1 Misso., 194; *Dunn vs. Adams*, 1 Ala., 527; *Edwards on Bills*, 51-2; 1 *Parsons N. & B.*, 10-13.

<sup>2</sup>*Byles on Bills*, (Sharswood's ed., p. 5.) *Caton vs. Lenox*, 5 Rand., 31. See also *Davis vs. Miller*, 14 Grat., 18; *Norton vs. Rose*, 2 Wash., 233.

<sup>3</sup>*Story on Bills*, § 18.

<sup>4</sup>*Lambert vs. Jones*, 2 Pat. & H., 144; *Mandeville vs. Welch*, 5 Wheat, 277; *Wells vs. Williams*, 39 Barb., 567; *Buckner vs. Sayre*, 18 B. Monroe, 745. It was held however, in *Marine and Fire Insurance Bank of Georgia vs. Jauncly*, 3 Sandford, 257, that the acceptance of a draft payable generally, does not vary its nature, nor convert it into an assignment of the property remitted on account, to the drawee; and that to make a Bill of Exchange operate as a transfer of the funds in view of which it was drawn, it must cease to be a bill in the sense of the Law Merchant. Remittances, however, may be made for the purpose of being applied to the payment of a particular instrument, under circumstances which will give rise to a trust, and create an equitable lien or title which may be enforced on behalf of all or any of the holders of the instrument. *Ex parte Prescott*, 3 Deacon, and Chitty, 218; 3 Lead. Cases in Equity, 359.

change drawn on funds? The question divides itself into two branches: First, Is a Bill of Exchange (a negotiable bill in its commercial sense,) drawn for the whole amount of a fund in the drawee's hands an assignment thereof? and Second, Is a Bill drawn for a portion of such funds an assignment?

The authorities are at variance on the first question, some ruling that a Bill for the whole fund is an assignment, some the contrary; and some confusion has arisen from a failure to discriminate between a proper Bill of Exchange, and an order or draft for or upon a particular fund. In the late case of *Bank of Commerce vs. Bogy*, 44 Misso., 13, in which a Bill was drawn for the whole of an amount due the drawer from the drawee, and afterwards negotiated, it was held that this did not operate as a legal or equitable assignment of the debt, and that suit could not be maintained thereupon against the drawee by the holder—although such a bill was competent evidence tending to show an assignment, and with other circumstances to show it was the intention of the drawer to assign the amount, would vest in the holder an exclusive claim to it. And this view seems sustained by reason and authority.<sup>1</sup>

In *Mandeville vs. Welch*, 5 Wheat, 277, Story, J., indicated an opinion that a Bill for the whole of a particular fund was an assignment, but that question was not before the Court; and no case has been found, says Professor Parsons, (Vol. I., N. & B., p. 33, note s,) in which a negotiable bill has been drawn for the whole amount of the fund, and the drawee has been sued on refusal to accept.

#### EFFECT OF NON-NEGOTIABLE DRAFT FOR ALL OF A FUND.

§ 10. The authorities concur that a non-negotiable draft for the whole of an amount due by the drawee is an assignment, and that the holder may recover it of the drawee. In *Anderson vs. Desoer*, 6 Grat., 364, a draft for \$10,000, drawn by Grivegree, a legatee, dated Malaga, 20th July, 1819, upon the executors of his uncle, at Richmond, Va., who had left him a legacy of \$10,000, directing that when forthcoming, and out of the funds destined for that object by his deceased uncle, they should pay that amount to the order of Messrs.

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<sup>1</sup>*Bank of Republic vs. Millard*, 10 Wallace, 152. See *post* chapter on Checks. *Sands vs. Matthews*, 27 Ala., 399; *Kimball vs. Donald*, 20 Misso., 577; *N. Y. and Va. State Bank vs. Gibson*, 5 Duer., 574; *Hurlburt, J., in Cowperthwaite vs. Sheffield*, Comst., 243; 1 Sandford, 415; *Winter vs. Drury*, 1 Seld., 525; *Luff vs. Pope*, 5 Hill 413; 7 Hill, 577. *Contra*, *Wheatly vs. Strobe*, 12 Calif., 92.

Scholtz & Brothers, for value received of them, noting the same as amount of legacy left him by his uncle, was held to be an assignment of the legacy, and as such to have precedence over an attachment thereupon served four days after the drawing of the draft, and before it was presented.

In *Gibson vs. Cooke*, 10 Pick., 15, in which case the effect of a *non-negotiable draft* was in question, the Court said: "It seems to be well settled that a draft by the creditor on his debtor, in the form of a Bill of Exchange to the amount of the debt, or the whole fund in his hands, is a good and valid assignment of the debtor fund." But none of these cases arose upon a negotiable bill.<sup>1</sup>

#### EFFECT OF A BILL FOR A PART OF A FUND.

§ 11. It is settled that a Bill of Exchange for a part of a fund is no assignment until accepted.<sup>2</sup>

#### EFFECT OF NON-NEGOTIABLE DRAFT FOR PART OF A FUND.

§ 12. There is conflict of authority upon the question whether or not a non-negotiable draft or order for a portion of a fund is an assignment. In *Mandeville vs. Welch*, 5 Wheat, 277, the Supreme Court held that such a draft was not an assignment, Story, J., saying "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract." In *Cowperthwaite vs. Sheffield*, 1 Sandf., 416, it was held that such an order was not an assignment unless accepted, but when accepted it would be; and it is difficult to see how this doctrine can be successfully controverted.<sup>3</sup>

§ 13. Formerly it was doubted whether or not it was not necessary to the character of a Bill of Exchange that it should be negotiable, which quality was imparted to it by making it payable "to order" or "to bearer." But it is now well settled in England and in the United States, and has been expressly decided in Virginia, that an instrument may be a bill without such words, and will be entitled

<sup>1</sup>To same effect, see *Cutts vs. Perkins*, 12 Mass., 209; *Robbins vs. Bacon*, 3 Greenl., 346; *Mortin vs. Naylor*, 1 Hill, 583. See 1 Pars. N. & B., 287, 333.

<sup>2</sup>1 Parsons N. & B., 332; *Mandeville vs. Welch*, 5 Wheat, 277.

<sup>3</sup>1 Pars. N. & B., 334; *Poydras vs. Delamare*, 13 La., 98; *Legro vs. Staples*, 16 Maine, 252; *Johnson vs. Thayer*, 17 *Id.*, 401; *M. Menomy vs. Farrers*, 3 Johns, 71. But see *Morton vs. Naylor*, 1 Hill, 583, and 1 Pars. N. & B., 334, note v.

to days of grace.<sup>1</sup> Nor are such words necessary to the character of a Promissory Note, though wherever the Statute of Anne has been adopted they are requisite to its negotiability.<sup>2</sup> In Virginia, the place of payment is the criterion of negotiability, and such words are neither necessary to render the paper a bill or note, or to render it negotiable.<sup>3</sup>

#### THE INSTRUMENT MUST BE UNSEALED.

§ 14. Except where it is otherwise provided by statute, an instrument under seal, although in all other respects in a negotiable form, is, according to the best authorities, not negotiable, and possesses none of the qualities of negotiable paper.<sup>4</sup> In a number of the States however, sealed instruments payable to order, or to bearer, are placed on the same footing as Bills and Notes, as in Ohio, Georgia, North Carolina.

A bill or note, however, is not considered as sealed unless there be a recognition of the seal in the body thereof, although a seal be actually attached to the signer's name, and the expressions are used which are usual in sealed instruments.<sup>5</sup> Such at least are the well established doctrines respecting promissory notes. As to a bill, it has been held that a seal attached and recognized, might be regarded as surplusage;<sup>6</sup> but as a bill may be valid as such without being negotiable in the full sense of the term, we can not see that more can be said than that the seal does not destroy its character as a bill, while it deprives it of negotiability.

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<sup>1</sup>Averett's adm'r vs. Booker, 15 Grat., 167; Michigan Bank vs. Eldred, 9 Wal., 544.

<sup>2</sup>See Chitty on Bills, p. 66; 1 Am. Lead. Cas., 302; Duncan vs. Maryland Saving Bank, 10 Gill & J., 300; Gerard vs. LaCoste, 1 Dallas, 194; Wills vs. Brigham, 8 Cush., 6; Raymond vs. Middleton, 29 Penn. St., 530; Bates vs. Butler, 46 Maine, 387; Caruth vs. Walker, 8 Wise, 252.

<sup>3</sup>Muir vs. Jenkins, 2 Cr. C. C. R., 18.

<sup>4</sup>Clegg vs. Lemesurier, 15 Grat., 108; Mann vs. Sutton, 4 Rand., 253; Hopkins vs. Railroad Co., 3 Watts & S., 410; Clark vs. Farmers' Manf. Co., 15 Wend., 256; Parks vs. Duke, 2 McCord, 380; Lewis vs. Wilson, 5 Blackf., 369.

<sup>5</sup>Peasley vs. Boatwright, 2 Leigh, 196. In Austin vs. Bullock, 4 Munf., 442, the following was held to be a Promissory Note, and the scroll annexed as a seal to be mere surplusage:

\$2,361.81.

RICHMOND, October 10, 1801.

On or before the first day of February next, we bind ourselves, our heirs, executors, or administrators, to pay Thomas and Amos Ladd, or order, two thousand three hundred and sixty-one dollars and eighty-one cents.

AUSTIN & ANDERSON, [L. s.]

<sup>6</sup>Irwin vs. Brown, 2 Cr. C. C. R., 314.

§ 15. A scroll affixed as a seal is generally of the same force as a seal, and parol evidence is admissible to show that a scroll affixed was intended as a seal.<sup>1</sup> An instrument binding the signers to pay a certain sum of money, and signed by some with, and by others without, seals, is the bond of the former, and the promissory note of the latter, and one action of debt may be brought against all the parties.<sup>2</sup>

§ 16. The bill must contain a certain direction, and the note a certain promise to pay. A bill is in its nature the demand of a right, not the mere asking of a favor, and therefore a supplication made, or authority given to pay an amount, is not a bill. The language, "Mr. Little please to let the bearer have £7 and place it to my account, and you will much oblige your humble servant," was held not a bill;<sup>3</sup> but on the other hand, where the language was: "Mr. Nelson will much oblige Mr Webb by paying I. Ruff, or order, on his account, twenty guineas," was held to import an order, and therefore a good bill.<sup>4</sup> The usual expression used in bills is "please pay," and it has been well said by Justice Story that the language should not be too nicely scanned, nor be regarded because of its politeness as asking a favor rather than demanding a right.<sup>5</sup> "Please let the bearer have \$50; I will arrange it with you this forenoon," and signed, "your's, most obedient," was held sufficient in Kentucky.<sup>6</sup> An instrument directing a certain person to deliver a particular sum to A. B, or to be accountable or responsible to him for a particular sum, would be a good bill,<sup>7</sup> and so would a direction to credit him in cash for a particular sum,<sup>8</sup> or any expression from which such direction could be inferred.

§ 17. A note must contain a certain promise to pay. The mere acknowledgment of a debt, such as "I. O. U. £ 200," has been held in England not a note,<sup>9</sup> but in a number of the States of the Union any due bill is regarded as a promissory note.<sup>10</sup> In Virginia, in the case of *Young vs. Johnston*, 10 Grat., 269, a bond running "due D. S. Young, on demand," was not excepted to as not importing a prom-

<sup>1</sup>Pollock vs. Glassell, 2 Grat., 439.

<sup>2</sup>Rankin vs. Toler, 8 Grat., 13.

<sup>3</sup>Little vs. Sackford, 1 Mood & Malk., 371. <sup>4</sup>Ruff vs. Webb, 1 Esp. R., 129.

<sup>5</sup>Story on Bills, § 33; Chitty, p. 150.

<sup>6</sup>Bresenthal vs. Williams, 1 Duvall, 329.

<sup>7</sup>Morris vs. Lee, 2 Lord Raymond, 1396.

<sup>8</sup>Ellinson vs. Collingridge, 9 C. & B., 570.

<sup>9</sup>Fisher vs. Leslie, 1 Esp., 420; Tompkins vs. Ashby, 6 B. & C., 541.

<sup>10</sup>Finney vs. Shirley, 7 Misso., 42; Marrigan vs. Page, 4 Humph., 247; Brewer vs. Brewer, 7 Georgia, 584; Lowe vs. Murphy, 9 Georgia, 338; Kimball vs. Huntington, 10 Wend., 675; Fleming vs. Barge, 6 Ala., 373.

ise, and "due A. B., or order, on demand," has been held sufficient.<sup>1</sup> There is no doubt that if any word be added from which a promise may be inferred, the instrument will be held a note. The language, "I do acknowledge myself indebted to A., in ———, *to be paid* on demand," has been held sufficient;<sup>2</sup> and so also "I. O. U. ———, to be paid on the 22d inst.,"<sup>3</sup> and so "Good to R. C., or order, for thirty dollars borrowed money."<sup>4</sup> If the word "payable" be inserted it makes a promissory note, in England and in this country.<sup>5</sup>

"I have received the sum of ———, which I borrowed from you, and I have to be accountable for the said sum with interest,"<sup>6</sup> and "I. O. U. ———, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid,"<sup>7</sup> have been held not notes, because not importing promises to pay.

§ 18. The fact of payment must be certain; the instrument must be payable unconditionally, and at all events, in order to be negotiable. If the order or promise be payable provided terms mentioned are complied with, it is not a bill or note;<sup>8</sup> and likewise if payable provided a certain act be not done,<sup>9</sup> or another person shall not previously pay,<sup>10</sup> or provided a certain ship shall arrive,<sup>11</sup> or provided the maker shall be able.<sup>12</sup> Sometimes a condition of time is expressed by the word "when," as "when A. shall marry,"<sup>13</sup> "when a certain suit is determined,"<sup>14</sup> or "when a certain sale is made,"<sup>15</sup> and in such cases the contingency implied deprives the instrument of its character as a bill or note, as the events named may never happen.

<sup>1</sup>Carrow vs. Hayes, 47 Maine, 257; Brady vs. Chandler, 31 Missouri, 28.

<sup>2</sup>Cashborne vs. Dutton, Selwyn, N. P., 371.

<sup>3</sup>Brooks vs. Elkins, 2 M. & W., 74.

<sup>4</sup>Franklin vs. March, 6 N. H., 364.

<sup>5</sup>Russell vs. Whipple, 2 Cowen, 536; Marrigan vs. Page, 4 Humph., 247; Lowe vs. Murphy, 9 Ga., 338; McGowen vs. West, 7 Mo., 569; Fleming vs. Burge, 6 Ala., 373; 1 Pars., N. & B., 24, 25.

<sup>6</sup>Horne vs. Redfearne, 4 Bing., N. C., 433.

<sup>7</sup>Melanotte vs. Teasdale, 13 M. & W., 216.

<sup>8</sup>Chitty, 134.

<sup>9</sup>8 Mod., 363.

<sup>10</sup>Roberts vs. Peake, 1 Burr, 323.

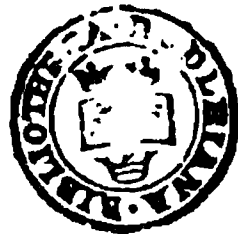
<sup>11</sup>Coolidge vs. Ruggles, 15 Mass. R., 387; Palmer vs. Pratt, 2 Bing., 185.

<sup>12</sup>*Ex-parte* Tootle, 4 Vesey, 372.

<sup>13</sup>Pearson vs. Garrett, 4 Mod., 242; Beardsley vs. Baldwin, Stra., 1157.

<sup>14</sup>Shelton vs. Bruce, 9 Yerger, 24.

<sup>15</sup>De Forest vs. Frary, 6 Cowen, 151.



If payable when, or so many days after, "A. shall come of age,"<sup>1</sup> the instrument would not be a bill or note, as A. might die a minor, and the fact that he actually attains majority does not alter it; but if the time when A. will come of age is specified it will be good, as it will be taken to be payable absolutely when the time arrives.<sup>2</sup> If payable within a certain time after a man's death, it is sufficient, because the event must occur;<sup>3</sup> and if the day of payment must come at the same time, it has been said that the distance is immaterial.<sup>4</sup> The English courts have gone so far as to hold that if payable at a certain time after a Government ship is paid off it would be good, because Government is sure to pay;<sup>5</sup> but this decision has been justly criticised and distrusted.<sup>6</sup>

An agreement to pay ninety days after the happening of two events, one of which may never happen, is not negotiable.<sup>7</sup>

§ 19. In England it has been held that an order for a sum "payable ninety days after sight, or when realized," was not a bill, as the latter alternative made it payable upon a contingency;<sup>8</sup> but the American cases incline to hold such engagements absolute and to sustain the commercial character of such instruments.<sup>9</sup>

A promise running "against the 25th of December, 1819, or when the house John Mayfield has undertaken to build for me is completed, I promise to pay, &c.," was held a negotiable note, the specific date being regarded as making it payable unconditionally at that time.<sup>10</sup>

A promise to pay a certain sum for stock "in whole, or from time to time in part, as the same shall be required, within thirty days after demanded, or upon notification of thirty days in any newspaper," would answer the conditions necessary to a negotiable promissory note.<sup>11</sup>

<sup>1</sup> *Kelley vs. Hemmingway*, 13 Ill., 604.

<sup>2</sup> *Goss vs. Nelson*, 1 Burr, 226.

<sup>3</sup> *Coode vs. Colehan*, 2 Stra., 1217.

<sup>4</sup> *Id.*

<sup>5</sup> *Andrews vs. Franklin*, 1 Stra., 24; *Evans vs. Underwood*, 1 Wils., 262.

<sup>6</sup> 1 *Parsons*, 40; *Edwards*, 142.

<sup>7</sup> *Sackett vs. Palmer*, 25 Barbour, 179.

<sup>8</sup> *Alexander vs. Thomas*, 16 Q. B., 333; *Heuschel vs. Mahler*, 3 Denio, 428.

<sup>9</sup> *Ubsdell vs. Cunningham*, 22 Misso., 124; *Stevens vs. Blunt*, 7 Mass., 240; *Cota vs. Buck*, 7 Metc., 588. In *Cota vs. Buck*, 7 Metc., 588, the promise to pay "as soon as realized" was supplemented by the farther promise, "which is to be paid in the course of the season now coming," and this was thought by the court to fix the time within definite limits.

<sup>10</sup> *Goodloe vs. Taylor*, 3 Hawks., 458.

<sup>11</sup> *Protection Ins. Co. vs. Bill*, 31 Conn., 534.



And so would a promise to pay a certain sum "in such manner and proportions, and at such time and place as A. shall require," being payable on demand;<sup>1</sup> but a like promise to pay at such times, and *in such articles* as C. may need for support, would not, the medium of payment not being money.<sup>2</sup>

If the note be in part for a sum certain, and part upon a contingency, it will not be negotiable.<sup>3</sup>

§ 20. In accordance with these principles, the character of the instrument as a bill or note is destroyed if it be made payable expressly or by implication out of a particular fund; for its payment becomes then conditioned on the sufficiency of that fund which may prove inadequate. Thus the insertion in an order of A. upon B. to pay a certain sum, of the words "on account of brick work done on a certain building,"<sup>4</sup> or "out of any money in his hands belonging to me,"<sup>5</sup> have been held to imply contingencies, and non-negotiable. So also where the paper was expressed as payable "for value received in stock, ale, brewing vessels, &c., this being intended to stand against the undersigned as a set-off for the sum left me in my father's will, above my sister's share,"<sup>6</sup> and where the words were added "out of rents,"<sup>7</sup> "out of my growing substance,"<sup>8</sup> out of the net proceeds of certain ore,<sup>9</sup> out of a certain payment when made,<sup>10</sup> or "the demand I have against the estate of A."<sup>11</sup>

§ 21. The statement of a particular fund, in a Bill, however, will not vitiate it, if inserted merely as an indication to the drawee how to reimburse himself. Thus where A. B. directed the defendant in writing to pay the plaintiff or order £9.10s "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance," the court held it a good bill, saying, "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person."<sup>12</sup> So it was held where the expressions were used, "pay A. L. or order

<sup>1</sup>Goshen vs. Turpin, 9 Johns., 217; Washington Co. Mut. Ins. Co. vs. Miller, 26 Vt., 77.

<sup>2</sup>Corbett vs. Steinmetz, 15 Wisc., 170.

<sup>3</sup>Palmer vs. Ward, 6 Gray, 340.

<sup>4</sup>Pitman vs. Crawford, 3 Grat., 127.

<sup>5</sup>Averett vs. Booker, 15 Grat., 163; Jenney vs. Hearle, 2 Ld. Raymond, 1361.

<sup>6</sup>Clarke vs. Perceval, 2 B. & Ad., 660.

<sup>7</sup>1 Parsons, N. & B., 43.

<sup>8</sup>Josselyn vs. Lacier, 10 Mod., 294.

<sup>9</sup>Wooden vs. Dodge, 4 Denio., 159.

<sup>10</sup>Haydock vs. Lynch, 2 Ld. Ray., 1563.

<sup>11</sup>West vs. Forman, 21 Ala., 400.

<sup>12</sup>Macleod vs. Snee, 2 Stra., 762; 2 Ld. Ray'd., 1481.



\$1500 for award No. 7, and charge to Bedford road assessment,"<sup>1</sup> and "Please pay Wm. L. Miller \$3,000, first to the satisfaction of judgments of E. Percival *vs.* R. & Wm. Cunningham, No. 40, July Term, 1852, in the District Court, and the balance to mortgage of Harvey H. Peterson, to me, dated 4, 1846, and oblige, B. Cousin."<sup>2</sup>

The decisions on this question are conflicting, and care should be taken not to put the instrument in doubt.<sup>3</sup>

§ 22. Although a draft upon a particular fund is not a Bill of Exchange, the payee in such a draft may recover of the drawer upon its non-acceptance if he give timely notice thereof.<sup>4</sup> But in an action on such an instrument a consideration must be averred.<sup>5</sup> And in like manner a consideration must be averred (except where statute has changed the rule) if the medium of payment be "lumber" or any thing else but money.<sup>6</sup>

§ 23. The character of the instrument as a bill or note is not vitiated by a memorandum on the face of it when it is evident that it was placed there merely as a convenient reference to the transaction in which the bill or note is used.<sup>7</sup> Sometimes it is stated in the note that the promiser appoints the payee, or order, or the holder, his attorney to confess judgment when the note is due; and the authorities differ upon the question whether or not such additions destroy the negotiability of the paper.<sup>8</sup> The later writers uphold the negotiability of such instruments.<sup>9</sup>

A memorandum that the maker of the note has deposited certain bonds to be sold in default of payment,<sup>10</sup> or certain title deeds with the payee, as collateral security, does not affect it;<sup>11</sup> nor that when paid

<sup>1</sup> Kelley *vs.* Mayor of Brooklyn, 4 Hill, 263.      <sup>2</sup> Cousin *vs.* Ledlie, 31 Penn., 506.

<sup>3</sup> 1 Parsons, 44.

<sup>4</sup> Joliffe *vs.* Higgins, 6 Munf., 3.

<sup>5</sup> 2 Rob. Prac. (N. Ed.), 143.

<sup>6</sup> Bilderback *vs.* Burlingame, 27 Ill., 311.

<sup>7</sup> See on this subject: Drawn *vs.* Cherry, 14 La. An. 694; Curle *vs.* Peers, 3 J. J., Marsh, 170; Smurr *vs.* Forman, 1 Ohio, 272; Nichols *vs.* Davis, 1 Bibb, 490; Tacker *vs.* Maxwell, 11 Mass., 143; Waters *vs.* Carleton, 4 Porter, 205; Shields *vs.* Taylor, 25 Miss., 13; VanVacter *vs.* Flack, 1 Smedes & M., 393; Hodges *vs.* Hall, 5 Ga., 163; Raigauel *vs.* Ayliff, 16 Ark., 594; Owen *vs.* Lavine, 14 Ark., 389; Kinney *vs.* Lee, 10 Tex., 155; Worden *vs.* Dodge, 4 Denio, 159; Atkinson *vs.* Marks, 1 Cowen, 691; Dyer *vs.* Covington Township, 19 Penn. St., 200; Smalley *vs.* Edey, 15 Ill., 324.

<sup>8</sup> Overton *vs.* Tyler, 3 Penn. State, 346; Osborn *vs.* Hawley, 19 Ohio, 130.

<sup>9</sup> Parsons, ii Vol., 147.

<sup>10</sup> Arnold *vs.* Rock River R. R. Co., 5 Duer., 207.

<sup>11</sup> Wise *vs.* Charlton, 4 A. & E., 786; Fancourt *vs.* Thorne, 9 Q. B., 312; Knipper *vs.* Chase, 7 Clarke, 145.

it will be in full of a certain judgment,<sup>1</sup> or that it is secured according to the condition of a certain mortgage,<sup>2</sup> nor any memorandum of the consideration;<sup>3</sup> but if the papers contain an addendum of an agreement, it becomes then evidence of a special contract, and loses its commercial character as a bill or note.<sup>4</sup> Thus a note for the hire of a negro, to which is added, "said negro to be furnished with the usual quantity of clothing,"<sup>5</sup> is not negotiable, and likewise if it be added, that "if any dispute should arise about the sale of goods for which the note is given, it should be void;"<sup>6</sup> or that it is "only a security for all balances up to its amount;"<sup>7</sup> or if provided that the payee is to receive less than the principal sum if it be paid before maturity;<sup>8</sup> and so an order directing the drawee to pay a certain amount, "and take up their note given to A. for that amount," is not a bill;<sup>9</sup> but the form is immaterial, and therefore an order written under a note "please pay the above note, and hold it against me in our settlement," signed by the drawer, and accepted by the drawee, has been held a bill,<sup>10</sup> and a like order written under an account has been likewise held a bill.<sup>11</sup> And where an indorsement was made on a bond, ordering the contents to be paid to order for value received, it was considered a good bill.<sup>12</sup>

§ 24. The rule seems to be that if the memorandum or collateral agreement impairs the essential characteristics of certainty necessary to negotiable paper, it destroys its negotiability, but otherwise not.<sup>13</sup> A promise to pay S., or order, \$1,000, or upon surrender of "this note" to issue stock for the same, does not violate this rule, and is a good note, the option to receive the stock being entirely with the payee.<sup>14</sup>

§ 25. The negotiability of a Promissory Note payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the Notary before whom the contract of sale was executed writing upon it the words "*ne varietur*," according to the laws and usages of that State, and others governed

<sup>1</sup>Ellett vs. Britton, 6 Texas, 229.

<sup>2</sup>Littlefield vs. Hodge, 6 Michigan, 326.

<sup>3</sup>Ryland vs. Brown, 2 Head, 270; Beardslee vs. Horton, 3 Mich., 560.

<sup>4</sup>Wells vs. Brigham, 6 Cush., 6; 2 Parsons, N. & B., 534.

<sup>5</sup>Barnes vs. Gorman, 6 Richardson, 297.

<sup>6</sup>Hartley vs. Wilkinson, 4 Camp., 127.

<sup>7</sup>Leeds vs. Lancashire, 2 Camp., 205.

<sup>8</sup>Fralick vs. Norton, 2 Mich., 130.

<sup>9</sup>Cook vs. Satterlee, 6 Cowen, 108.

<sup>10</sup>Leonard vs. Mason, 1 Wend., 522.

<sup>11</sup>Hoyt vs. Lynch, 2 Sandf., 328.

<sup>12</sup>Bay vs. Freazer, 1 Bay., 66; *contra* Norris vs. Solomon, 2 M. & Rob., 117.

<sup>13</sup>2 Pars. N. & B., 146-7.

<sup>14</sup>Hodges vs. Shuler, 22 N. Y., 114.

by the civil law;<sup>1</sup> nor by the fact that it is secured by a mortgage, but the latter will pass with it as an incident of the transfer.<sup>2</sup>

TO ACQUIRE THE NEGOTIABLE CHARACTER THE BILL OR NOTE  
MUST BE PAYABLE IN MONEY.

§ 26. This rule has been strictly followed in England, though relaxed in many cases in the United States.<sup>3</sup> It was held in England, that a note payable in cash, or Bank of England notes, was not negotiable under the Statute of Anne, though the bills of that Bank were at any time redeemable in money.<sup>4</sup> In Pennsylvania, this ruling was followed upon an instrument payable in "current bank bills or notes," the Court remarking that "it was payable in more than forty kinds of paper of different value."<sup>5</sup> The Supreme Court of the U. S. held in *Irvine vs. Lowry*, 14 Peters, 293, that a note payable "in office notes of a Bank," was not negotiable.

In business paper it is best to adhere to strict rules; and as certainty is of the first moment in commercial dealings, and paper payable in fluctuating values is uncertain and delusive, we think sound judgment approves these decisions. Money, alone, is legal tender, and only the note which represents money should be held negotiable.<sup>6</sup> It should be expressed simply as payable in dollars, which have a definite signification fixed by law.<sup>7</sup>

<sup>1</sup>Flecker vs. Bank U. S., 8 Wheat, 338.

<sup>2</sup>Croft vs. Bunster, 9 Wisc., 503.

<sup>3</sup>In the following cases, instruments payable as indicated were held negotiable: "In current Ohio bank notes," Swetland vs. Creigh, 15 Ohio, 118; "in current funds of the State of Ohio," White vs. Richmond, 16 Ohio, 5; "in funds current in the City of New York," Lacy vs. Holbrook, 4 Ala., 88; "in good current money of this State," (or in Arkansas money,) Graham vs. Adams, 5 Ark., 261; Wilburn vs. Greer, 1 Eng., 255; but otherwise if "in Arkansas money of the Fayetteville branch," Hawkins vs. Watkins, 5 Ark., 481; in New York, "in York State bills or specie," Keith vs. Jones, 9 Johns, 120; "in bank notes current in the City of New York," Judah vs. Harris, 19 Johns, 144; "in North Carolina Bank notes," Deberry vs. Darnell, 5 Yerg., 451; "in lawful current money of Pennsylvania," Wharton vs. Morris, 1 Dallas, 124; "in foreign money," Sanger vs. Stimpson, 8 Mass., 260; "in currency," Butler vs. Paine, 8 Minn., 324. "Current money" seems an unimpeachable phrase—as lawful legal tender money must of course be understood. In the 23d chap., 16th verse Abraham is said to have purchased the Cave of Machpelah for so much "current money with the merchant."

<sup>4</sup>*Ex parte* Iveson, 2 Rose, 225; 2 Buck, 1 S. P.

<sup>5</sup>McCormick vs. Trotter, 10 Serg't & Rawle, 94; and in the following cases the instruments were held "not negotiable:" Payable in "Kentucky currency," Lampton vs. Haggard, 3 Monroe, 149; "in current money of Kentucky," McCherd vs. Ford, 3 Mon-

<sup>6</sup>Beirne vs. Dunlap, 8 Leigh, 514.

<sup>7</sup>Omohundro vs. Crump, 18 Grat., 703.

§ 27. It was held in *Thompson vs. Sloan*, 23 Wend., 71, that a note payable in New York "in Canada money," was not negotiable, on the ground that a Court of one of the United States could not take judicial notice of what was "money" in a foreign country. And the Court said: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery.<sup>1</sup> A note payable in pounds, shillings and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument, is to aver and prove the value of the sum expressed, in our own tenderable coin."

#### THE INSTRUMENTS MUST BE FOR THE PAYMENT OF MONEY ONLY.

§ 28. Thus, if it be to pay and "all fines according to rule," it is a good contract but not a bill or promissory note.<sup>2</sup>

§ 29. When the term "dollars" is used in any security for money given in any of the United States, it is understood to mean dollars "of the lawful money of the United States;" and extraneous evidence

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roe, 166; "in the currency of this State," *Chambers vs. George*, 5 Litt., 335; "in cash, or cash notes," *Linden vs. Kenney*, 1 Bibb, 330; "in current bills," *Collins vs. Lincoln*, 11 Vt., 268; in Tennessee, "in current bank notes," or "current bank notes of Tennessee," *Gamble vs. Hatton*, 1 Peck, 130; *Whiteman vs. Childress*, 6 Hum., 303; "in bank bills," *Simpson vs. Meneden*, 3 Cold., 429; "in New York funds or their equivalent," *Hasbrook vs. Palmer*, 2 McLean, 10; "in current bank bills," *Fry vs. Rousseau*, 3 McLean, 106; "in foreign bills," *Jones vs. Fales*, 4 Mass., 245; "in paper medium," *Lange vs. Kohne*, 1 McCord, 115; "at the Commercial Bank of Buffalo, in Canada money," *Thompson vs. Sloan*, 23 Wend., 71; "in current bank notes," *Little vs. Phoenix Bank*, 2 Hill, 425; "in Pennsylvania or New York paper currency," *Lieber vs. Goodrich*, 5 Cowen, 186.

<sup>1</sup>Chit. on Bills, 615; *Deberry vs. Darrell*, 5 Yerg., 451.

<sup>2</sup>*Ayrey vs. Tearnsides*, 4 M. & W., 168; If any other agreement be engrafted on the paper, it is deprived of its character as a bill or note. If payable in "cash or specific articles," it is not a good bill or note: *Matthews vs. Houghton*, 2 Fairf., 377; nor if it be to pay money and deliver up horses and a wharf: *Martin vs. Chauntry*, 2 Stra., 1271; nor if it add "and to take up a certain outstanding note:" *Cook vs. Satterlee*, 6 Cowen, 108; nor "whatever sum you may collect of me for C:" *Legro vs. Staples*, 16 Maine, 252; nor "all other sums which may be due," *Smith vs. Nightingale*, 2 Stark, 375; nor "a certain sum the same to go as a set-off," *Clarke vs. Percival*, 2 B. & Ad., 660; nor "the proceeds of a shipment of goods, value about £2,000, consigned by me to you," *Jones vs. Simpson*, 2 B. & C., 318; nor "the demands of the sick club in part of interest," *Bolton vs. Dugdale*, 4 B. & Ad., 619; nor "deducting all advances and expenses," *Cushman vs. Haynes*, 20 Pick., 132. See 1 Am. Lead. Cases, 315.

will not be permitted as a general rule to give it a different signification.<sup>1</sup> But under peculiar circumstances, such as arose during the existence of the Confederate States, when "dollars" was applied to Confederate currency in all circles, parol or other evidence will be permitted to explain the true meaning and intent with which they were employed.<sup>2</sup>

§ 30. In *Thorington vs. Smith*, 8 Wallace, 12, Chief Justice said, in delivering his opinion upon the legal effect of a note for \$10,000, dated Montgomery, Ala., (which was in the Confederate States during the war,) November 28th, 1864: "It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the National Government, is a contract to pay *lawful money of the United States*, and can not be modified or explained by parol evidence.<sup>3</sup> But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity, which under the general rules of evidence, may be removed by parol evidence."

§ 31. The sum is generally expressed with certainty; and so the amount can be ascertained from the face of the paper, the form of expression is immaterial. Therefore, a promise to pay bearer a certain sum per acre for so many acres as a certain tract contained, was held to be a note as soon as the number of acres was indorsed upon it.<sup>4</sup>

§ 32. If there be added to the amount "with current exchange on another place," the commercial character of the paper is not impaired, as that is capable of definite ascertainment;<sup>5</sup> but there are cases which hold that such an addition destroys the negotiable character of the paper, and renders it a special promise requiring proof of considera-

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<sup>1</sup>*Bank vs. Supervisors*, 7 Wallace, 26; *Thorington vs. Smith*, 8 Wallace, 12; *Omo-hundro vs. Crum*, 18 Grat., 705; *Lohman vs. Crouch*, 19 Grat., 321; *Smith vs. Walker*, 1 Call., 24; *Commonwealth vs. Beaumarchais*, 3 Call., 107.

<sup>2</sup>*Lohman vs. Crouch*, 19 Grat., 331; *Thorington vs. Smith*, 8 Wallace, 12.

<sup>3</sup>*Lawful money of the United States Bank vs. Supervisors*, 7 Wall., 26.

<sup>4</sup>*Smith vs. Clopton*, 4 Tex., 109.

<sup>5</sup>*Smith vs. Kendall*, 9 Mich., 241; *Leggett vs. Jones*, 10 Wisc., 34. See also *Grutacup vs. Woulloise*, 2 McLean, 581; *Price vs. Teal*, 4 McLean, 201.

tion.<sup>1</sup> Where there is such an addition to a bill or note, payable where it is drawn, it is clear that it might be rejected as surplusage, there being in such case no exchange.<sup>2</sup>

#### INSTRUMENT MUST BE PAYABLE IN MONEY.

§ 33. A bond payable "in notes of the United States Bank, or either of the Virginia banks," has been held not payable in money;<sup>3</sup> but where the bond was for a certain sum, and it was added, "which sum may be discharged in notes or bonds due on good solvent men in R.," it was held payable in money.<sup>4</sup> But the Courts would not go so far, we think, as to hold an instrument couched in such terms negotiable,<sup>5</sup> for in order to possess that quality it should afford on its face every element necessary to fix its value.

By recent decision of the U. S. Supreme Court, the Treasury notes of the United States were pronounced legal tender.<sup>6</sup> It can not be doubted, therefore, that an instrument payable in them by express terms, would now be held negotiable; for although the simple word "dollars" be used, its payability in that medium is implied.

#### FORMAL REQUISITES OF BILLS AND NOTES.

§ 34. Besides the essential requisites of Bills and Notes, there are some of formal character which it is important to observe. There should appear upon the face of the instrument: 1st, The date; 2nd, The amount; 3rd, The time of payment; 4th, The place of payment; 5th, Name of the drawer or maker; 6th, Name of the drawee, (if it be a bill;) 7th, Name of the payee. There are some expressions usual in such instruments which should be noticed, and the fact that the engagement evidenced by them is not consummated until they are delivered.

§ 35. As to the date, it is usually written in the right hand corner of the instrument; but no date is essential to the validity of a bill or note;<sup>7</sup> and it is of no consequence on what portion of the paper it is written.<sup>8</sup> If there be no date, it will be considered as dated at the time it was made;<sup>9</sup> and parol evidence is admissible

<sup>1</sup>Lowe vs. Bliss, 24 Ill., 168; Read vs. McNulty, 12 Rich., (Law,) 445.

<sup>2</sup>Clauser vs. Stone, 29 Ill., 116; Hill vs. Todd, 29 Ill., 103; Byles on Bills, (Sharswood Ed.,) 73.

<sup>3</sup>Beirne vs. Dunlap, 8 Leigh, 514.

<sup>4</sup>Butcher vs. Carlisle, 12 Grat., 520.

<sup>5</sup>Williams vs. Sims, 22 Ala., 512.

<sup>6</sup>Legal Tender Cases, 12 Wallace, 457.

<sup>7</sup>Michigan Ins. Co. vs. Leavenworth, 30 Vt., 11.

<sup>8</sup>Sheppard vs. Graves, 14 Howard, 505.

<sup>9</sup>Giles vs. Bourn, 6 M. & Sel., 73.

to show from what time an undated instrument was intended to operate;<sup>1</sup> or to show that there was a mistake in the date when the instrument has not been transferred to third parties;<sup>2</sup> when a note without date is made for another's accommodation, the maker authorizes him to fill up the date as he sees fit.<sup>3</sup>

§ 36. Bills, checks and notes, are sometimes post dated or ante dated for purposes of convenience;<sup>4</sup> and the fact that they are negotiated prior to the day of date, is not a suspicious circumstance against which parties must guard.<sup>5</sup> The indorsee of a bill which was post dated, and indorsed by the payee who died the day before the day of date, was held in an English case to have derived title through the indorser, and entitled to recover against the drawer;<sup>6</sup> and this case has been followed in the United States.<sup>7</sup>

§ 37. When the paper is payable at a specified time after date, it is almost indispensable that the date should appear on its face, for, otherwise, if it be a bill, the drawee can not tell when it falls due, nor can an indorsee tell whether it be a bill or note. Nor can the holder know when to present it for payment, nor when it will be considered overdue. When the bill or note is payable at sight, or on demand, or on a certain day, the date is not so material; but to avoid difficulty, it should never be omitted,<sup>8</sup>

#### AMOUNT OR SUM PAYABLE.

§ 38. *As to the amount*, it is usually specified in figures in the lower left hand corner of the instrument, as well as in writing in the body of it. Where a difference appears between the words and figures, evidence can not be received to explain it; but the words in the body of the paper must control;<sup>9</sup> and if there is a difference between printed and written words, the written must control.<sup>10</sup> If

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<sup>1</sup> *Davis vs. Jones*, 25 L. J., C. P. 91; 17 C. B., 625 (84 E. C. L. R.); *Richardson vs. Ellett*, 10 Texas, 190.

<sup>2</sup> *Drake vs. Rogers*, 32 Maine, 524.

<sup>3</sup> *Androscoggin Bank vs. Kimball*, 10 Cushing, 373.

<sup>4</sup> *Gray vs. Wood*, 2 Har. & J., 328; *Ritcher vs. Selin*, 8 Sergt. & R., 425.

<sup>5</sup> *Edwards on Bills*, 151; *Brewster vs. McCardel*, 8 Wend., 478.

<sup>6</sup> *Pasmore vs. North*, 13 East, 517.

<sup>7</sup> *Brewster vs. McCardel*, 8 Wend., 478.

<sup>8</sup> See *Story on Bills*, § 48.

<sup>9</sup> *Payne vs. Clark*, 19 Mo., 152; *Riley vs. Dickens*, 19 Ill., 30; *Smith vs. Smith*, 1 Rhode I., 398; *Mears vs. Graham*, 8 Blackt., 144; *Saunderson vs. Piper*, 5 Bing., N C., 425.

<sup>10</sup> 1 Pars. N. & B., 29; 2 Pars. on Contracts, 28-29.



the words are so obscurely written or printed as to be indistinct, the figures in the margin may be referred to to explain them.<sup>1</sup> If by inadvertence the amount is expressed in figures only, it will suffice,<sup>2</sup> but it has been held that where the figures were in the margin of the paper, and the amount was left blank in the body of it, it was fatally defective.<sup>3</sup>

If it had really been the intention of the parties to the paper that the words should be written so as to conform to the figures, it seems clear that there was implied authority to the holder to fill the blank accordingly.<sup>4</sup> Where the word "dollars" is left out, or the dollar mark is omitted, they will, nevertheless, be supplied in this country, where, under the like circumstances, "pounds" would be supplied in England.<sup>5</sup> Where "three hundred dollars" was expressed in a note, it was left to a jury to say whether or not "three, &c.," was intended;<sup>6</sup> and a note for "the sum of fifty-two, 25-100," was held to denote, beyond question, that the fraction meant was "dollars."<sup>7</sup>

§ 39. A manifest informality of expression or grammatical error, whether in respect to amount, time, place or other matter, will in no wise, affect the validity of a bill or note. In *Perkins' Case*, 7 Grat., 651, it was held that a note in form negotiable, but running "sixty days after date I *promised* to pay," instead of "I promise," was as good as if the promise in the past tense had been expressed in the present.<sup>8</sup>

A note payable "twenty-four after date,"<sup>9</sup> and one payable "six after date,"<sup>10</sup> have been held not void for uncertainty, but parol evidence has been admitted to ascertain the intention of the parties; and a note payable "four months after," has been held payable "four months after date."<sup>11</sup>

<sup>1</sup> *Riley vs. Dickens*, 19 Ill., 29.

<sup>2</sup> *Sweetzer vs. French*, 13 Metcalf, 262.

<sup>3</sup> *Norwich Bank vs. Hyde*, 13 Conn., 279.

<sup>4</sup> *Bank of Commonwealth vs. Curry*, 2 Dana, 142; *Bank of Limestone vs. Penick*, 5 Monroe, 25.

<sup>5</sup> *Williamson vs. Smith*, 1 Cold., 1; *McCoy vs. Gilmore*, 7 Ohio, 268; *Murrill vs. Handy*, 17 Mo., 406; *Coolbroth vs. Purinton*, 29 Maine, 469; *Sweetser vs. French*, 13 Metcalf 262; *Northrop vs. Sanborn*, 22 Vt., 433; *Booth vs. Wallace*, 2 Root, 247; *Rex vs. Elliott*, 1 Leach. C. C., 175; *Phipps vs. Tanner*, 5 C. & P., 488.

<sup>6</sup> *Burnham vs. Allen*, 1 Gray, 496.

<sup>7</sup> *Murrill vs. Handy*, 17 Mo., 406.

<sup>8</sup> *Commonwealth vs. Parmenter*, 5 Pick., 279.

<sup>9</sup> *Conner vs. Routh*, 7 How., (Miss.), 176.

<sup>10</sup> *Nichols vs. Frothingham*, 45 Maine, 220. <sup>11</sup> *Pearson vs. Stoddard*, 9 Gray, 199.



“With ten per cent. after due,” clearly means with ten per cent. “interest” after due, although the word was omitted.”<sup>1</sup>

§ 40. As to the time of payment, bills and notes are usually drawn payable at a specified time after date, or after sight, or at sight. Sometimes they are made payable on demand, or no time is specified in which case on demand is understood. A note promising to pay when the maker can make it convenient, has been held payable within a reasonable time;<sup>2</sup> but it could not be considered negotiable, as certainty in respect to the time of payment is requisite.<sup>3</sup>

When the word month is used in specifying the time of payment, a calendar month is understood; and the word year signifies a calendar year.

§ 41. The place of payment is not necessarily specified, but very often is. In some of the States, it is requisite that the note should be payable at a bank or bankers, in order to be negotiable; but in such cases the expression that it shall be *negotiable* at a certain bank, does not render it *payable* there, and consequently would not render it negotiable.<sup>4</sup> Bills and notes made payable at a particular bank or place, are nevertheless payable at large, and presentment at such bank or place, is not necessary in order to charge the maker or acceptor.<sup>5</sup> When no place of payment is expressed, the instrument is payable in the State where it is made.<sup>6</sup> It is said to have been thought essential to a bill at one time, that it should be drawn in one place and payable in another, but that, if ever entertained, is utterly obsolete.<sup>7</sup>

#### NAME OF MAKER OR DRAWER.

§ 42. The name of the maker or drawer must be inserted or subscribed<sup>8</sup> by himself or his agent; but there must be no uncertainty as to who the maker or drawer is; thus, a note must not be signed A. B., or else C. D.<sup>9</sup> The name of the drawer, however, may be inscribed before it is certain what will be the exact form of the instrument, for it has been decided in England that he who signs his name

<sup>1</sup> Higley vs. Newell, 28 Iowa, 516.

<sup>2</sup> Lewis vs. Tipton, 10 Ohio, (N. S.,) 88.

<sup>3</sup> See ante §

<sup>4</sup> Barrett vs. Wills, 4 Leigh, 117.

<sup>5</sup> Barrett vs. Wills, 4 Leigh, 117; Mandeville vs. Union Bank, 9 Cranch, 11.

<sup>6</sup> Wilson vs. Lazier, 11 Grat., 477.

<sup>7</sup> Miller vs. Thompson, 4 M. & G., 260.

<sup>8</sup> Taylor vs. Dobbins, Str., 399; Elliott vs. Cowper, Str., 609; Lord Raym., 1376; Smith vs. Jarvis, Lord Raym., 1484; Ereskin vs. Murray, *Id.*, 1542.

<sup>9</sup> Ferris vs. Bond, 4 B. & Ald., 679; Bayley 5th ed., 17.

upon a sheet of stamped paper, which he delivers to another, is liable on any bill which that person may think fit to draw on it, and which the stamp is sufficient to cover.<sup>1</sup> If a man draw a bill, or make a note in the name of another without authority, he may be personally liable on it.<sup>2</sup>

If the character of liability which the party intends to assume is indicated, it is immaterial on what portion of the paper his signature is written;<sup>3</sup> and the name is not necessary if it be sufficiently indicated who the party is. A note signed "Steamboat Ben Lee and owners,"<sup>4</sup> has been held sufficient; and likewise a bill drawn on "Steamer C. W. D. and owners,"<sup>5</sup> and accepted "Steamer C. W. D., by A. B., agent."<sup>6</sup>

If the drawer's name be neither inserted on, or subscribed to the bill, he will not be liable upon it even though it be accepted and indorsed.<sup>6</sup> The signature need not be subscribed. "I, A. B., promise to pay," is a sufficient note.<sup>7</sup>

§ 43. A note by two or more makers may be either joint, or joint and several. A note signed by more than one person, and beginning "we promise," is joint only. A joint and several note usually expresses that the makers jointly and severally promise. But a note signed by more than one person, and beginning "I promise," is several as well as joint;<sup>8</sup> and so also is one signed by two makers, and running "we or either of us promise to pay."<sup>9</sup>

### THE DRAWEE.

§ 44. It is necessary that every bill be addressed to a particular person—the drawee.<sup>10</sup> But, it will not be less a bill because instead of being addressed to a particular person it is addressed to a particu-

<sup>1</sup>Collins *vs.* Emmett, 1 H. Bl., 313; Leslie *vs.* Hastings, 1 M. & Rob., 119; Molloy *vs.* Delves, 7 Bing., 428; Abrahams *vs.* Skinner, 12 Ad. & E., 763.

<sup>2</sup>Wilson *vs.* Barthrop, 2 M. & W., 863; Polhill *vs.* Walters, 3 B. & Ad., 114.

<sup>3</sup>Hunt *vs.* Adams, 5 Mass., 359; Clason *vs.* Bailey, 14 Johns, 484.

<sup>4</sup>Sanders *vs.* Anderson, 21 Mo., 402. <sup>5</sup>Alabama C. *vs.* Brainard, 35 Ala., 478.

<sup>6</sup>May *vs.* Miller, 27 Ala., 515; Tevis *vs.* Young, 1 Metcalf, (Ky.) 197.

<sup>7</sup>Saunderson *vs.* Jackson, 2 B. & P., 238.

<sup>8</sup>Holman *vs.* Gilliam, 6 Rand., 39. See also Hemmenway *vs.* Stone, 7 Mass., 58; Barret *vs.* Skinner, 2 Bailey, 88; Marsh *vs.* Ward, Peake, 130; Partridge *vs.* Calby 19 Barb., 248; Ladd *vs.* Baker, 6 Foster, 76.

<sup>9</sup>Pogue *vs.* Clark, 25 Ill., 335; Harvey *vs.* Irvine, 11 Iowa, 82.

<sup>10</sup>2 Rob. Prac. (New Ed.,) 144; Peto *vs.* Reynolds, 9 Exch., 410; Reynolds *vs.* Peto 11 Exch., 418.

lar house—at least when it has been accepted;<sup>1</sup> for acceptance estops the acceptor from denying that he was the drawee.<sup>2</sup> A bill may be addressed by the drawee to himself, but such an instrument is rather a note than a bill.<sup>3</sup> “At” prefixed to the drawee’s name instead of “to” does not alter the character of the bill.<sup>4</sup>

A note made by a party payable to himself is a nullity unless he indorse it, and then by his indorsement it becomes an ordinary promissory note payable to bearer, or to the indorsee, or to order, according to the terms of the indorsement.<sup>5</sup> If payable to the maker’s order, or to him or order, it is a good note.<sup>6</sup>

### THE PAYEE.

§ 45. The bill or note must point out with certainty the person who is to receive the money—that is, the payee; and, therefore, it can not be made payable to one of two persons in the alternative.<sup>7</sup>

The payee need not be named in person, it being sufficient if some one be indicated. Thus, if payable to A. or order, or to bearer, or to holder, it is intended to mean whoever comes in lawful possession. So if there is any description on the face of the paper fixing who the party is, it is sufficient. Thus, if payable “to the Administrators of the estate of A.”<sup>8</sup> or to “the Trustees acting under the will of A.”<sup>9</sup> or to “A, the treasurer of a certain society, or his successor in office,”<sup>10</sup> or “to the order of the indorser’s name.”<sup>11</sup>

<sup>1</sup> Gray *vs.* Milner, 8 Taunt., 739, 3 J. B. Moore, 90.

<sup>2</sup> Wheeler *vs.* Webster, 1 E. D. Smith, 1; 1 Parsons, N. & B., 289; Butler *vs.* Crips, 1 Salkeld, 130; But see Peto *vs.* Reynolds, 9 Exch., 410.

<sup>3</sup> Roach *vs.* Ostler, 1 Man. & R., 120; Harvey *vs.* Kay, 9 B. & C., 361; Robinson *vs.* Bland, 2 Burr, 1077; Miller *vs.* Thompson, 3 Man. & G., 576; Randolph *vs.* Parish, 9 Port. Ala., 76; Wildes *vs.* Savage, 1 Story, 22; Cunningham *vs.* Wardwell, 3 Fairf., 466; Hasey *vs.* White Pigeon Co., 1 Doug., Mich., 193; Marion *vs.* M. R. R. Co., 7 Ind., 404.

<sup>4</sup> Shulteworth *vs.* Stephens, 1 Camp., 407; Allan *vs.* Mawson, 4 Camp., 115; Rex *vs.* Hunter, Russ & R. C. C., 511; Regina *vs.* Smith, 2 Moo. C. C., 295.

<sup>5</sup> Muldron *vs.* Caldwell, 7 Misso., 563; Scull *vs.* Edwards, 8 English, 24; Hooper *vs.* Williams, 2 Exch., 13.

<sup>6</sup> Miller *vs.* Weeks, 22 Penn. St., 89; Smalley *vs.* Wight, 44 Maine, 442.

<sup>7</sup> Musselman *vs.* Oakes, 19 Ill., 81; Osgood *vs.* Pearson, 4 Gray, 455; Walrad *vs.* Petrie, 4 Wend., 575; Samuels *vs.* Evans, 1 McLean, 473; Spaulding *vs.* Evans, 2 McLean, 139; Blanckenhagen *vs.* Blundell, 2 B. & Ald., 417.

<sup>8</sup> Adams *vs.* King, 16 Ill., 169; Moody *vs.* Threlkeld, 13 Ga., 55.

<sup>9</sup> Megginson *vs.* Harper, 2 Crompt. & M., 322.

<sup>10</sup> Fisher *vs.* Ellis, 3 Pick., 322.

<sup>11</sup> United States *vs.* White, 2 Hill, (N. Y.,) 59.

And if there was a misdescription or misspelling of the name, it may be shown who was really intended.<sup>1</sup> But it has been held that a promise to pay "to the estate of M. L., deceased,"<sup>2</sup> was not sufficient, and so would a promise payable to "the Secretary, for the time being,"<sup>3</sup> of a certain society; but it would be otherwise if payable "to the *new* Secretary, or order,"<sup>4</sup> as he could be definitely ascertained. If no one be named or definitely referred to as payee, the instrument is fatally incomplete; and therefore "500 on demand value received"<sup>5</sup> is mere waste paper; and so also papers running "Good for one hundred and twenty-six dollars on demand,"<sup>6</sup> and "pay on within \$750."<sup>7</sup> But "received of A. one hundred dollars which I promise to pay on demand"<sup>8</sup> is regarded as sufficient, it being inferred that A. is the payee. And it has been held that a paper payable to order only was to be considered as payable to bearer in favor of a *bona fide* holder.<sup>9</sup>

§ 46. A bill or note may be made payable to a fictitious person, or his order, and indorsed in the name of such fictitious payee, in favor of a *bona fide* holder *without notice of the fiction*, and be considered on the same footing as a bill or note payable to bearer;<sup>10</sup> but it seems that it would be considered void as to any holder who had notice of the fiction.<sup>11</sup>

If the name of the payee be left blank, it may be filled by any *bona fide* holder with his own;<sup>12</sup> but until filled up the paper is a nullity.<sup>13</sup>

<sup>1</sup> *Jacobs vs. Benson*, 39 Maine, 132; *Willis vs. Barrett*, 2 Stark., 29; *Hall vs. Tafts*, 18 Pick., 455.

<sup>2</sup> *Tittle vs. Thomas*, 30 Miss., 132; *Lyon vs. Marshall*, 11 Barbour, 241.

<sup>3</sup> *Storm vs. Stirling*, 3 Ellis & B., 382.

<sup>4</sup> *Id.*, *Robertson vs. Steward*, 1 Man. & G., 511; *Davis vs. Garr*, 2 Seld., 124; *Rex vs. Box*, 6 Taunt., 325.

<sup>5</sup> *Gibson vs. Minet*, 1 H. Bl., 569.

<sup>6</sup> *Brown vs. Gilman*, 13 Mass., 158; See, also, *Mayo vs. Chenoweth*, Breese, 155; *Mathews vs. Redwine*, 23 Miss., 233; *Enthoven vs. Hoyle*, 13 C. B., 373.

<sup>7</sup> *Douglass vs. Wilkeson*, 6 Wend., 637.

<sup>8</sup> *Green vs. Davies*, 4 B. & C., 235; *Ashby vs. Ashby*, 3 Moore & P., 186.

<sup>9</sup> *Davega vs. Moore*, 3 McCord, 482.

<sup>10</sup> *Minet vs. Gibson*, 3 T. R., 481; 1 H. Bl., 569; *Vere vs. Lewis*, 3 T. R., 182; *Collis vs. Emett*, 1 H. Bl., 312; *Plets vs. Hill*, 3 Hill, (N. Y.) 112; 3 Kent, Com., p. 78; 1 Pars. N. & B., 32; *Story on Bills*, §§ 56, 200; *Lane vs. Krekle*, 22 Iowa, 399.

<sup>11</sup> *Bennett vs. Farnell*, 1 Camp., 130; *Maniort vs. Roberts*, 4 E. D. Smith, 83. See, on this subject, *Lane vs. Krekle*, 22 Iowa, 399.

<sup>12</sup> *Brummel vs. Enders*, 18 Grat., 900; *Crutchley vs. Clarence*, 5 Taunt., 529, (1 E. C. L. R.); *White vs. Vermont, &c., R. R. Co.*, 21 Howard, 575.

<sup>13</sup> *Seay vs. Bank of Tennessee*, 3 Sneed, 558.

§ 47. As to the statement of advice, it is usual for a Bill of Exchange to state the account to which it is to be charged. If to the account of the drawer, "put it to my account" is usually inserted; and if to that of the drawee, "put it to your account;" and if to account of a third person, "put to account of A. B."

Sometimes "as per advice," or "without advice," is inserted; and when the former, the drawee is not bound to accept or pay until such advice is received. If he does, it is at his peril. Sometimes provision is made, in the bill, that the holder in case of need shall apply to another drawee; by which is meant, that if the first drawee refuse to honor the bill, the second shall be resorted to. The holder is bound to apply to the party so indicated, and he may accept or pay the bill without protest. The usual form is: "In case of need, apply to C. D., at E."<sup>1</sup>

§ 48. The words, "value received," are commonly expressed in bills and notes, and it was formerly held that they were essential to their negotiability;<sup>2</sup> but they are not now regarded as at all material, being considered as implied where the other elements of negotiability exist.<sup>3</sup>

And even when the note is not negotiable, if it contains a promise to pay money, it is *prima facie* evidence of indebtedness, whether it contain these words or not; and the holder may recover upon it without alleging or proving a consideration.<sup>4</sup>

#### DELIVERY.

§ 49. A bill or note is not considered as executed or binding until delivered;<sup>5</sup> but a delivery and at the time of date, will be presumed until the contrary appear.<sup>6</sup> However, if payable at a certain time after date, the time will still be estimated from the date, no matter when the paper was delivered.<sup>7</sup>

<sup>1</sup> Chitty on Bills, 185; Byles, p. 182; Story on Bills, § 65.

<sup>2</sup> Byles on Bills (Sharwood's Ed.,) 592; Edwards on Bills, p. 158; Priddy *vs.* Henbrey, 1 B. & C., 674, (8 E. C. L. R.)

<sup>3</sup> Arnold *vs.* Sprague, 34 Vt., 402; Cowisia *vs.* Tedlie, 7 Casey, 506; Townsend *vs.* Derby, 3 Met., 563; Hatch *vs.* Traves, 11 Ad. & E., 702, (39 E. C. L. & R.;) Benjamin *vs.* Fillman, 2 McLean, 213; Kendall *vs.* Galvin, 15 Maine, 131.

<sup>4</sup> Peasley *vs.* Boatwright, 2 Leigh, 195; Cunningham *vs.* Herndon, 2 Ca'l, 530.

<sup>5</sup> Marvin *vs.* McCullum, 20 Johns, 288; Chamberlin *vs.* Hopps, 8 Vt., 94; Ward *vs.* Churn, 18 Grat, 801; Hopper *vs.* Eiland, 21 Ala., 714.

<sup>6</sup> Lansing *vs.* Caine, 2 Johns, 300; Woodford *vs.* Dorwin, 3 Vt., 82; Roberts *vs.* Bethell, 12 C. B., 778; Sinclair *vs.* Baggaley, 4 M. & W., 312.

<sup>7</sup> Bumpass *vs.* Timms, 3 Sneed, 459; Snaith *vs.* Mingay, 1 Maule & S., 87; Barker *vs.* Sterne, 9 Exch., 684.

A bill or note, as well as a deed, may be delivered as an escrow—that is, delivered to a third party to hold until a certain event happens, or certain conditions are complied with; and then the liability of the parties commences as soon as the event happens, or the conditions are fulfilled without actual delivery by the depositary to the promisee.<sup>1</sup>

A bill or note as an escrow can not be delivered to the promisee;<sup>2</sup> but if it is so delivered and transferred by him to a *bona fide* holder without notice, it will be binding.<sup>3</sup>

If the party who has signed or indorsed the instrument die before delivery, it is a nullity, and can not be delivered by his personal representative;<sup>4</sup> but if advances had been made on the faith of a delivery, then the promisee or indorsee would be entitled to a delivery.<sup>5</sup>

§ 50. A bill or note signed and delivered on Sunday, as between the parties, is invalid; but if delivered on any other day, it is valid, though signed on Sunday; and between the parties it is competent that it was signed and delivered on a different day, though dated on Sunday.<sup>6</sup> And if dated on another day, but actually signed and delivered on Sunday, it is still valid in the hands of a *bona fide* holder without notice of the defect; and it seems that an accommodation note, made on Sunday, but indorsed by the payee on Monday, is valid, as it then, for the first time, becomes a completed contract.<sup>7</sup>

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<sup>1</sup>Couch vs. Meeker, 2 Conn., 302.

<sup>2</sup>See 1 Pars., N. & B., 51.

<sup>3</sup>*Ibid*, Vallett vs. Parker, 6 Wend., 615.

<sup>4</sup>Clark vs. Boyd, 2 Ohio, 56; Clark vs. Sigourney, 17 Conn., 511; Bromage vs. Lloyd, 1 Exch., 32.

<sup>5</sup>Perry vs. Crammend, 1 Wash., C. C., 100; 1 Pars., N. & B., 49.

<sup>6</sup>Lovejoy vs. Whipple, 18 Vt., 379; Drake vs. Rogers, 32 Maine, 521; Aldridge vs. Branch Bank, 17 Ala., 45; Bank of Cumberland vs. Mayberry, 4 Hubbard, 198; Finney vs. Callendar, 8 Officer, 41; State Bank vs. Thompson, 42 N. H., 369.

<sup>7</sup>*Ibid*.

*Transfer of Negotiable Paper.*

§ 1. A bill or note payable to bearer, or indorsed in blank, may be transferred like currency by mere delivery; other bills and notes by indorsement of the transferrer's name thereon, and delivery to the indorsee,<sup>1</sup> unless they are not expressed to be payable to the order of any person, or to bearer, in which case, unless by statute, they are not negotiable in the United States and in England;<sup>2</sup> but it is otherwise in Scotland.<sup>3</sup> But if the paper be payable to A. B., or order, and A. B. indorse it to C. D. without adding "or order," C. D. may nevertheless transfer it by indorsement, and it retains its original negotiable character.<sup>4</sup>

While commercial paper payable to bearer, or indorsed in blank, may be transferred by delivery merely, yet if the payee put his name upon it, and transfers it, he is liable as an indorser, such indorsement being valid between the indorser and subsequent indorsees;<sup>5</sup> and the holder of paper payable to bearer and indorsed, may sue upon it as bearer or indorsee at his election.<sup>6</sup>

§ 2. If a note be non-negotiable because payable to a certain person *only*, should he indorse it, it will be binding upon him; and his liability to his immediate indorsee will be the same as upon the indorsement of a negotiable note; but the principle is not extended to subsequent indorsees.<sup>7</sup> And if indorsed by the payee payable "to order of" indorsee, it will be negotiable as between the holder and indorsers, though not as to the maker.<sup>8</sup>

<sup>1</sup>Wookey *vs.* Poole, 4 B. & A., 1; Myers *vs.* Friend, 1 Rand., 13; Rees *vs.* Conococheague Bank, 5 Rand., 326.

<sup>2</sup>Byles on Bills, (Sharswood's edition,) 258.

<sup>3</sup>Thomson on Bills, (Wilson's edition,) 173.

<sup>4</sup>Muldrow *vs.* Caldwell, 7 Mo., 563; Lea *vs.* Branch Bank, 8 Porter, (Ala.), 119; Scull *vs.* Edwards, 8 Eng., 24; Potter *vs.* Tyler, 2 Met., 58; Blackman *vs.* Green, 24 Vt., 17.

<sup>5</sup>Bates *vs.* Butler, 46 Maine, 387; Hodge *vs.* Steward, 1 Salk., 125; Hill *vs.* Lewis, 1 Salk., 132; Burmester *vs.* Hogarth, 11 M. & W., 97; Brush *vs.* Reeves, 3 Johns., 439; Gilbert *vs.* Nantucket Bank, 5 Mass., 97; Eccles *vs.* Ballard, 2 McCord, 388; Gwinnell *vs.* Herbert, 5 Ad. & E., 436, (31 E. C. L. R.)

<sup>6</sup>3 Kent Com., 44; Story on Notes, § 132; Chitty, 220; Bayley, 466.

<sup>7</sup>See Story on Notes, §§ 128, 129, 130; Story on Bills, §§ 119, 199, 202. See Carruth *vs.* Walker, 8 Wis., 252.

<sup>8</sup>Carruth *vs.* Walker, 8 Wis., 252.



When the instrument is made payable to "order," the indorsement of the payee is necessary to transfer the legal title;<sup>1</sup> and the transferee, without indorsement, takes it as a mere chose in action, and must aver and prove the consideration.<sup>2</sup> But if the transfer was for a valuable consideration, the indorsement by the transferrer, where necessary or intended, may be compelled by the holder.<sup>3</sup>

§ 3. As to transfers by indorsement, the term indorsement, in its technical sense, is applicable only to negotiable paper;<sup>4</sup> and it is important to bear this in mind, as the effect of indorsing a negotiable instrument, and assigning or becoming the surety or guarantor of one non-negotiable, is very different. In common parlance, the word is indifferently applied to Bonds, Bills and Promissory Notes, whether negotiable or otherwise, and confusion of ideas will only be avoided by holding in view its definite legal signification.

§ 4. Indorsing an instrument in its literal sense means writing one's name on the back thereof; and in its technical sense it means writing one's name thereon with intent to incur the liability of a transferrer. The term assignment is applied to the transfer of negotiable paper payable to bearer by delivery, and the transfer of other species of choses in action. When we speak commercially of paper being indorsed to a party, the idea of its being transferred and delivered to him is included—the term indorsement including delivery to the indorsee.<sup>5</sup> Neither indorsement nor acceptance are complete before delivery.<sup>6</sup>

Accordingly, it has been held that where A. specially indorsed certain bills to B, sealed them up in a parcel, and left them in charge with his own servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient, though it would have been otherwise had the delivery been made to the post-

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<sup>1</sup>Hopkirk *vs.* Page, 2 Brock, 20; Hestone *vs.* Williamson, 2 Bibb, 83; Russell *vs.* Swan, 16 Mass., 314; Blakely *vs.* Grant, 6 Mass., 386.

<sup>2</sup>VanEman *vs.* Stanchfield, 10 Minn., 255.      <sup>3</sup>Rose *vs.* Sims, 1 B. & Ad., 521.

<sup>4</sup>Orrick *vs.* Colston, 7 Grat., 195; Bank of Marietta *vs.* Pindall, 2 Rand., 475.

<sup>5</sup>Freeman's Bank *vs.* Ruckman, 16 Grat., 129; Bank of Marietta *vs.* Pindall, 2 Rand., 475; Thomas *vs.* Watkins, 16 Wis., 478; Dann *vs.* Norris, 24 Conn., 333; Adams *vs.* Jines, 12 Ad. & El., (40 E. C. L. R.,) 455; Lloyd *vs.* Howard, 20 L. J., Q. B. I. (19 E. C. L. R.,) 14 Q. B., 995; Marston *vs.* Allen, 8 M. & W., 493; Green *vs.* Steer, 1 Q. B., 707, (41 E. C. L. R.)

<sup>6</sup>Rex *vs.* Lambton, 5 Price, 428; Lysaght *vs.* Bryant, 9 C. B., 46, (67 E. C. L. R.)



man.<sup>1</sup> But where A. & B. being partners and indebted to C., A. who acted as C.'s agent, with B.'s concurrence, indorsed a bill in the name of the firm, and placed it amongst the securities which he held for C., but no communication of the fact was made to C. personally, it was held a good indorsement of the firm to C.<sup>2</sup>

§ 5. The distinction between indorsement and assignment was well pointed out in *Bank of Marietta vs. Pendall*, 2 Rand., 475, by Cabell, J., who said: "The term indorse when applied to Bills of Exchange, negotiable by the custom of merchants, or to papers made negotiable by our statutes, may *ex vi termini* import a legal transfer of the title. But as to bonds and notes, not negotiable, the legal title to them passes by assignment only, *and as to them indorsement is not equivalent to assignment*. As to them assignment means more than indorsement; it means by one party, with intent to assign, and an acceptance of that assignment by the other party. The notes in question are not negotiable according to our laws, but assignable only. They might well be *indorsed* in Virginia and assigned in Ohio. The pleas, therefore, that they were *indorsed* in Virginia tendered immaterial issues, and were properly demurred to." There is no doubt that if the note had been negotiable the averment that it was *indorsed* in Virginia would have been considered as including transfer of title and delivery,<sup>3</sup> and "indorsed and delivered" would be sufficient as to non-negotiable paper.<sup>4</sup>

#### EQUITABLE ASSIGNMENT.

§ 6. There may be an assignment of bills and notes, and other negotiable securities, by operation of law, or as it is termed by *equitable assignment*. The assignment of any particular claim is considered an equitable assignment of all securities held by the assignor to assure it. Thus the assignment of a debt by whatever form of transfer, carries with it any bill or note by which it is secured; and the converse of the proposition is equally true, that the transfer by indorsement, or assignment of a bill or note, carries with it all securities for its payment.<sup>5</sup>

<sup>1</sup>Rex vs. Lambton, 5 Price, 428; Bayley on Bills, 137; Byles on Bills, (Sharswood's edition,) 265.

<sup>2</sup>Lysaght vs. Bryant, 9 C. B., 46, (67 E. C. L. R.)

<sup>3</sup>Marston vs. Allen, 8 M. & W., 494; Adams vs. Jones, 12 Ad. & E., 455; Hayes vs. Cau'field, 5 Q. B., 81.

<sup>4</sup>Freeman's Bank vs. Ruckman, 16 Grat., 129.

<sup>5</sup>Dunn vs. Snell, 15 Mass., 485; Titcomb vs. Thomas, 5 Greenl., 282; Jones vs. Witter, 13 Mass., 282; Waller vs. Tate, 4 B. Monroe, 529; Miller vs. Ord, 2 Binn., 382; Fox vs. Foster, 4 Penn. St., 119; Croft vs. Bunster, 9 Wis., 503.

§ 7. Negotiable instruments may be also assigned by a separate and distinct paper, although not delivered, as by deed or mortgage, conveying them specifically, or all "choses in action,"<sup>1</sup> but it has been held that such an assignment carried only the equitable and not the legal title.<sup>2</sup> The deed or other instrument by which the assignment is made, operates as a constructive delivery of the paper, and the transferrer holds it as agent of the transferee.<sup>3</sup>

LIABILITY OF TRANSFERRER BY ASSIGNMENT OR DELIVERY  
WITHOUT INDORSEMENT.

§ 8. As to transfers, by delivery: When the instrument is payable to bearer, or indorsed in blank, and the holder transfers it by delivery to another party, he ceases to be himself a party, and incurs none of the responsibilities of an indorser.<sup>4</sup> He is termed the assignor, or transferrer of the paper, and the party receiving it the assignee, or transferee. Such assignor or transferrer may indeed guaranty the payment of the paper upon such transfer, and he will be liable on such contract;<sup>5</sup> but it is collateral to the obligations created by the paper itself, and is ordinarily limited to the immediate parties thereto.<sup>6</sup>

§ 9. But the transferrer of a bill or note, by mere delivery, incurs certain responsibilities of a more limited nature than an indorser does. He warrants by implication, unless otherwise agreed: (1.) that he is a lawful holder, and has a valid title to the paper, and a right to transfer it;<sup>7</sup> (2.) that the instrument is genuine, and not forged or fictitious;<sup>8</sup> and (3.) that he has no knowledge of any facts which prove the paper, if originally valid, to be worthless, either by the failure of the maker, or by its being already paid, or otherwise to have become void or defunct;<sup>9</sup> for any suppression of such knowledge would be a fraud.

<sup>1</sup>McGee vs. Riddlesgarber, 39 Misso., 365; Grand Gulf Bank vs. Wood, 12 Smedes & M., 482.

<sup>2</sup>Grand Gulf Bank vs. Wood, 12 Smedes & M., 482.

<sup>3</sup>Byles on Bills, (Sharswood's Ed.,) 260, note i.

<sup>4</sup>Byles on Bills (Sharswood's ed.,) 274.

<sup>5</sup>Story on Notes, § 117.

<sup>6</sup>*Id.*, 117; Story on Bills, 215.

<sup>7</sup>Burrill vs. Smith, 7 Pick., 291.

<sup>8</sup>Lyons vs. Miller, 6 Grat., 439; Ellis vs. Wild, 6 Mass., 321; Markle vs. Hatfield, 2 Johns., 455; Jones vs. Ryde, 5 Taunt., 488; Eagle Bank vs. Smith, 5 Conn., 71; Bayley on Bills, 179; Story on Notes, § 118.

<sup>9</sup>Young vs. Adams, 6 Mass., 182; Camidge vs. Allerby, 6 B. C., 372; Tenn vs. Harrison, 3 Term R., 757.

§ 10. There is much conflict of authority upon the question whether or not the transferrer by delivery is bound if it should happen without his knowledge that at the time of the transfer, the maker or principal party to the paper—a bank whose note is transferred, for instance—is insolvent. Some of the authorities maintain that the transferrer should bear the loss<sup>1</sup> in such case, some the transferee;<sup>2</sup> and Story says the weight of reasoning, and the weight of authority seems to be in favor of the former;<sup>3</sup> but in respect to bank notes, at least, which stand upon a peculiar footing as the representatives of money, we humbly differ from him in opinion. And respecting bills and notes as well, the better opinion is that the transferrer should not be liable to refund the consideration if they turn out to be valueless by the insolvency of the parties. Some one has to lose, and supposing good faith in all parties, there can be no juster rule than to let the misfortune rest where it falls. The transaction has been properly regarded as a sale of the bill or note in the market, and as said by Lord Kenyon, “having taken it without indorsement, he has taken the risk on himself.”<sup>4</sup>

The reasoning of Chief Justice Gibson in *Bayard vs. Spunk*, 1 Watts & S., 92, is, we think, a convincing argument. He says: “The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin, is disproved by daily experience, which shows that they circulate by the consent of the whole communities at their nominal value when notoriously below it. But why hold the payor responsible for a fail-

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<sup>1</sup> Story on Bills, § 111; Story on Notes, § 119; *Lightbody vs. Ontario Bank*, 11 Wend., 1, 13 Wend., 107; *Harley vs. Thornton*, 2 Hill, So. Car., 509; *Fogg vs. Sawyer*, 9 N. H., 365; *Wainwright vs. Webster*, 11 Vt., 576; *Thomas vs. Todd*, 6 Hill (N. Y.), 340; *Townsend vs. Bank of Racine*, 7 Wisc., 185; *Westfall vs. Braley*, 10 Ohio St., 188.

<sup>2</sup> *Edmonds vs. Digges*; *Young vs. Adams*, 6 Mass., 182; *Scruggs vs. Cass*, 8 Yerger, 175; *Lowry vs. Murrell*, 2 Porter, 282; *Bayard vs. Spunk*, 1 Watts & S., 92; *Corbet vs. Bank of Smyrna*, 2 Har. (Del.), 235; *Ware vs. Street*, 2 Head., 609.

<sup>3</sup> Story on Notes, § 119.

<sup>4</sup> *Fudell vs. Clark*, 1 Esp., 447; *Tenn vs. Harrison*, 3 T. R., 759; *Evans vs. Whyte*, 5 Bing., 485; *Ex parte Shuttleworth*, 3 Vesey, 368; Judge Sharswood, concurring with the Text of Byles on Bills, says in his note (5th Am. Ed.,) p. 275, “it is conceived that the confusion has arisen from neglecting to distinguish between the abstract question of law, and questions of fact in the particular case.” See Redfield and Bigelow’s *Lead. Cas.*, p. 634.

ure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse, with the seeds of mortal disease in him, might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the meantime; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction or after it, is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank-note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers, would more than counterbalance the good to be done by hindering the crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

“The case of a counterfeit bank-note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential, existence (2 Kent, 468;) and a

forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank-note than a dead horse is a living one; and it is an elementary principle that what has no existence can not be the subject of a contract. But it can not be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its note holders and depositors; and even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which every thing like effects, and even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But, independent of that, the difference between forgery and insolvency in relation to the transfer of a bank-note, is as distinctly marked as the difference between title and quality in relation to the sale of a chattel."

Especially is the transferrer without indorsement not bound when there is an exchange of the bill or note of a third party for merchandise.<sup>1</sup>

In some cases, however, it has been held that where in a trade or

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<sup>1</sup> *Burgess vs. Chapin*, 5 Rhode Island, 225; *Beckwith vs. Farnum*, 5 *Id.*, 230; *Bicknall vs. Waterman*, 5 *Id.*, 43.

In Chitty on Bills, 145, it is said: "When a transfer by delivery, without indorsement, is made, merely by way of sale of the bill, as sometimes occurs, or exchange of it for other bills, or by way of discount, and not as security for money lent, or where the assignee expressly agrees to take it in payment, and to run all risks, he has in general no right of action whatever against the assignor in case the bill turns out to be of no value. But there can be no doubt, that if a man assign a bill for any sufficient consideration *knowing it to be of no value*, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received."

In Byles on Bills (Sharswood's ed.,) 275, it is said: "It is conceived to be the general rule of the English law and the fair result of the English authorities, that the transferrer is not even liable to refund the consideration, if the bill or note so transferred by delivery without indorsement turn out to be of no value, by reason of the failure of other parties to it. For the taking to market of a bill or note *payable to bearer* without indorsing it, is *prima facie* a sale of the bill. And there is no implied guaranty of the solvency of the maker, or of any other party."

like transaction, the paper of a third party is given, and he, unbeknown to either, is insolvent, the loss must fall upon the transferrer.<sup>1</sup>

§ 11. A distinction is taken which seems well founded between the cases in which the paper of a third party is given by delivery merely for a cotemporaneous consideration, and those in which it is transferred for a pre-existing debt; and the doctrine seems well sustained that in the latter case, it operates only as a suspension of the debt during the time it has to run, and if dishonored, the original liability revives.<sup>2</sup> The transferrer by delivery is not entitled in such cases to notice of dishonor; but if there is unreasonable delay in informing him of it, he may show in defense any injury he has sustained by the actual laches of the creditor.<sup>3</sup>

The law infers the suspension merely of the pre-existing debt; but if there was an express contract, or circumstances implying a contract on the part of the creditor to accept the stranger's paper in payment, then he would be held to his bargain, although it threw upon him an entire loss—the burden of proof to this effect being upon the transferrer.<sup>4</sup>

#### NATURE OF THE CONTRACT OF INDORSEMENT.

§ 12. The indorsement of a bill or note is not merely a transfer of the paper, but it is a fresh and substantive contract. The indorsement of a bill is equivalent to a new bill drawn by the indorser upon the acceptor in favor of the indorsee.<sup>5</sup> The indorser contracts that if the drawer of the bill, or maker of the note, as the case may be, shall not pay it at maturity, he will on receiving due notice of the dishonor, pay the holder the sum which the drawee ought to have paid, together with such damages as the law fixes as an indemnity.<sup>6</sup> He also contracts in the case of a bill payable at a future day that if the drawee refuse to accept on presentment, he will in like manner pay.<sup>7</sup>

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<sup>1</sup> *Roberts vs. Fisher* (Court of Appeals, 1870,) *Law Times State Court Reports*, August, 1871, p. 197.

<sup>2</sup> *Marsh vs. Pedder*, 4 Camp., 257; *Taylor vs. Briggs, Moody and M.*, 28; *Robinson vs. Read*, 9 B. and C., 449.

<sup>3</sup> 2 Pars., N. and B., 184.

<sup>4</sup> 2 Parsons N. and B., 185; *Eagle Bank vs. Smith*, 5 Conn., 71.

<sup>5</sup> *Billgery vs. Branch*, 19 Grat., 418; *Evans vs. Gee*, 11 Peters, 80; *Hill vs. Lewis*, 1 Salk., 132; *Van Stafhorst vs. Pearce*, 4 Mass., 258.

<sup>6</sup> *Suse vs. Pompe*, 8 C. B., N. S., 538 (98 E. C. L. R.)

<sup>7</sup> *Smith vs. Johnson*, 27 L. J. Exch., 363; 3 H. and N., 222.

§ 13. As indorsement falls under the general rule that the obligations of a personal contract are to be determined by the law of the place of its execution, an indorser may become responsible for a much higher rate of damages and of interest, upon the dishonor of a note, than he can recover from the drawer;<sup>1</sup> and the jurisdiction of the Federal Courts of the United States attaches upon an indorsement as a distinct contract, independently of the residence of the original and remote parties to the instrument.<sup>2</sup>

The indorsement or assignment of a bill or note being an independent contract, the circumstances which would invalidate any other contract apply to it with like effect. Thus, a war between the countries of which the indorsee and indorser are citizens, rendering them alien enemies, any commercial transaction between them, such as drawing a bill upon, or making or indorsing or assigning a note to the other, is void,<sup>3</sup>

In *Billgerry vs. Branch*, 19 Grat., 393, it appeared that checks were drawn by a bank in Richmond, Va., upon a bank in New Orleans, and were indorsed in Petersburg, Va., in February, 1863, while the late war was in progress, to a resident of Vicksburg, Miss. Petersburg, Richmond and Vicksburg were then in the Confederate lines, and Vicksburg in the permanent possession of the Federal forces. It was held that the indorsement was illegal and void, and that the indorsee could not recover against the indorser, in an action brought after the war.

§ 14. A bill or note can not be indorsed for part of the amount due the holder, and such an indorsement is utterly void as such,<sup>4</sup> but when it has been paid in part it may be indorsed as to the residue.<sup>5</sup> And an indorsement of part of the amount due would give the intended indorsee a lien on the instrument.<sup>6</sup> If the indorsement on its face is of the whole instrument, without any apparent limitation so that the holder could enforce it against the parties liable thereon,

<sup>1</sup> *Slocum vs. Pomeroy*, 6 Cranch, 221; *Powers vs. Lynch*, 3 Mass., 77.

<sup>2</sup> *Coffee vs. Planters Bank*, 13 Howard, 183.

<sup>3</sup> *Billgerry vs. Branch*, 19 Grat., 417-37; *Griswold vs. Waddington*, 16 Johns., 438; *Willison vs. Pattiser*, 7 Taunt., 439 (2 E. C. L. R.;) same case I, J. B. Moore, 133.

<sup>4</sup> *Hawkins vs. Cardy*, 1 Lord Raymond, 160; *Bayley on Bills*, (Am. Ed.) 92; *Thompson on Bills*, (Wilson's Ed.,) 184; *Hughes vs. Kiddell*, 2 Bay., 324, in which case it was held that where two indorsements for parts of the amount were made they were invalid, though together they purported to transfer the whole.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Byles on Bills*, (Sharswood's Ed.), 291.



it would be immaterial that as between the indorser and his immediate indorsee a part of the amount only was to be received for the latter's benefit, and the residue as trustee for his indorser.<sup>1</sup>

### FORM OF THE INDORSEMENT.

§ 15. The indorsement is generally made by writing the transferer's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name.<sup>2</sup> The full name should be written, but the initials will suffice,<sup>3</sup> as will also any mark instead of the name, made to represent it.<sup>4</sup>

Writing on the paper, "pay the contents to A.," is a transfer, so far as it authorizes payment to be made to A., but it does not render the writer liable as an indorser.<sup>5</sup>

It has been held that the figures "1, 2, 8," written in pencil, was sufficient, connected with evidence tending to show that the party who placed them on the paper intended to bind himself as an indorser.<sup>6</sup> This decision is questioned by Prof. Parsons, (2 Vol., N. & B., 17;) but with the utmost respect for that eminent jurist, it seems to us sound, on the ground that it was intended as a mark to represent the indorser's name.<sup>7</sup> A written agreement to pay a note "as if by me indorsed" written on it, is considered an indorsement, in the legal sense.<sup>8</sup> It is settled that the writing may be done in any legible way by pen, or pencil.<sup>9</sup>

§ 16. The indorser may write his own name, or he may authorize any one to write it for him. If the name be in the handwriting of the paper, but the indorser receives notice, is sued, suffers default

<sup>1</sup> Reid *vs.* Furnival, 1 C. & M., 538; 5 C. & P., 499, (24 E. C. L. R.)

<sup>2</sup> Gibson *vs.* Powell, 6 Howard (Miss.), 60; Quin *vs.* Sterne, 26, Georgia, 223; Herring *vs.* Woodhull, 29, Illinois, 92; Partridge *vs.* Davis, 20 Vt., 449; Rex *vs.* Begg, 3 P. Wms., 419; 1 Stra., 18.

<sup>3</sup> Merchant's Bank *vs.* Spicer, 6 Wend., 443; Palmer *vs.* Stephens, 1 Denio, 471; Bank *vs.* Flanders, 6 N. H., 239; Rogers *vs.* Colt, 6 Hill, 322; Williamson *vs.* Johnson, 1 Barn & C., 146.

<sup>4</sup> George *vs.* Surrey, 1 Mood & Malk, 516; Baker *vs.* Dening, 8 Ad. & El., 94; Addy *vs.* Grix, 8 Vesey, 504.

<sup>5</sup> Vincent *vs.* Horlock, 1 Camp., 442.

<sup>6</sup> Brown *vs.* Butcher's, Bank, 6 Hill, 443.

<sup>7</sup> Redfield & Bigelow's Leading Cases, 110, 111.

<sup>8</sup> Pinnes *vs.* Ely, 4 McLean, 173.

<sup>9</sup> Geary *vs.* Physic, 5 Barn. & Cres., 234; Brown *vs.* Butcher's Bank, 6 Hill, 443; Closson *vs.* Stearns, 4 Vt., 11.



and makes no defense or denial until after the maker absconds, he can not deny his signature; or if he does, proof that he had assumed other paper similarly indorsed would be conclusive against him.<sup>1</sup>

The indorsement must, as a general rule, be somewhere on the paper itself, or attached thereto, and unless it is, the party can not be held liable as an indorser,<sup>2</sup> but a promise made on a sufficient consideration will sustain an action upon its breach.<sup>3</sup>

When a note is transferred with guaranty, the transfer may be good, though the guaranty be void under the statute of frauds.<sup>4</sup>

#### WHO MAY INDORSE OR TRANSFER NEGOTIABLE PAPER.

§ 17. Any person legally competent to enter into a contract may be the indorser, or transferrer by delivery of negotiable paper.<sup>5</sup> If payable to the order of the payee, he or his legal representative, must be the transferrer. In case of the bankruptcy of the payee of a bill or note, all his rights become vested in the assignees, who may transfer it in their own name;<sup>6</sup> and the bankrupt can not;<sup>7</sup> and in the case of the death of the payee the like right devolves upon his executors or administrators.<sup>8</sup>

§ 18. In the case of the marriage of a woman who is payee or indorsee of a bill or note, the property thereof vests in her husband, and he alone can indorse or transfer it; and in like manner, if the paper be made payable to her after marriage, her husband alone can indorse or transfer it.<sup>9</sup> But this principle is subject to the limitation that the wife may, with the consent of the husband, indorse a bill or note made payable to her, and pass a good title to the indorsee.

The law being based upon the distinction that coverture of the wife creates a disability on her part to enter into a contract which

<sup>1</sup> *Weed vs. Carpenter*, 10 Wend., 403.

<sup>2</sup> *Tenn. vs. Harrison*, 3 T. R., 757.

<sup>3</sup> *Moxon vs. Pulling*, 4 Camp, 51.

<sup>4</sup> *Crosby vs. Roub*, 16 Wisc., 616.

<sup>5</sup> 2 Pars., N. & B., 3; Story on Bills, § 195.

<sup>6</sup> *Chitty*, 227; Story on Notes, § 123; ex parte Brown, 1 Glyn. & J., 407.

<sup>7</sup> *Ashurst vs. Bank of Australia*, 37 Eng., L. & Eg. R., 149.

<sup>8</sup> *Watkins vs. Maule*, 2 Jac. & Walk., 237; *Rawlinson vs. Stone*, 3 Wils., 1; *Rand vs. Hubard*, 4 Met., 252; *Malbon vs. Southard*, 36 Maine, 147; *Durght vs. Newell*, 15 Illinois, 333.

<sup>9</sup> *Chitty*, 26; Story on Notes, § 124; *Barlow vs. Bishop*, 1 East., 433; *Connor vs. Martin*, 1 Stra., 516; *Miles vs. Williams*, 10 Mod., 243; *Savage vs. King*, 5 Shep., 301; *Miller vs. Delamater*, 12 Wend., 433.

the assent of the husband may remove.<sup>1</sup> The indorsement of the wife, under such circumstances, is equivalent to that of her husband. Her act becomes in law his act, and the indorsee must claim through the husband by a title derived from him.<sup>2</sup>

§ 19. An infant is not bound upon his indorsement of a bill or note, being incapable of making a contract; but he may, by his indorsement, (which is voidable—not absolutely void,) transfer the paper to any subsequent holder, against all the parties thereto, except himself.<sup>3</sup>

§ 20. When a bill or note is payable, or indorsed to a co-partnership, any member of the firm may transfer it during the continuance of the firm, and indorse it in the firm name;<sup>4</sup> and upon the death of a member of the firm, the survivor may indorse it *in his own name*.<sup>5</sup> But the indorsement by a partner to his co-partner, or to another person, of a bill or note payable to the firm, in his individual name, will not pass the title to the paper, nor enable the indorsee to bring a suit on it in his own name.<sup>6</sup> It has been held, however, that such an indorsement would pass the equitable title.<sup>7</sup>

If there be a dissolution of the co-partnership, (otherwise than by the death of a partner,) the survivor can not indorse in the firm name a bill or note payable to the firm;<sup>8</sup> even though the partner had power to settle the partnership affairs;<sup>9</sup> but the contrary has been held if the dissolution were unknown to the indorsee,<sup>10</sup> and the rule does not

<sup>1</sup> Chitty on Bills, 21, 200; Stevens vs. Beals, 10 Cushing, 291; Miller vs. Delamater, 12 Wend., 433; Hancock Bank vs. Joy, 41 Maine, 568; Reakert vs. Sanford, 5 Watts & S., 164; Leeds vs. Vail, 15 Penn., St., 185; Fredd vs. Eves, 4 Harr., (Del.), 385; Cotes vs. Davis, 1 Camp., 485; Prestwick vs. Marshall, 7 Bing., 565; 4 Car. & P., 594; Prince vs. Brunatte, 1 Bing., N. C., 435; 2 Bright, Husb. and Wife, 42; Lindus vs. Bradwell, 5 Com., B., 583; Lord vs. Hall, 8 C. B., 627.

<sup>2</sup> Stevens vs. Beals, 10 Cush., 291, and cases in note *ante*.

<sup>3</sup> Story on Bills, § 196; Story on Notes, § 124; Bayley on Bills, 44; Chitty, 21; 2 Parsons N. & B., 2 Vol. 3; Nightingale vs. Withington, 15 Mass., 272; Taylor vs. Croker, 4 Esp., 187; Jeune vs. Ward, 2 Stark., 326; Grey vs. Cooper, 3 Doug., 65.

<sup>4</sup> Story on Notes, § 125; Bayley on Bill, 53. <sup>5</sup> Jones vs. Thorn, 14 Martin, 463.

<sup>6</sup> Elstabrook vs. Smith, 6 Gray, 570; Robb vs. Bailey, 13 La. An., 457; Fletcher vs. Dana, 4 Blackf., 377; Desha vs. Stewart, 6 Ala., 852; Moore vs. Denslow, 14 Conn., 235; Absolem vs. Marks, 11 Q. B., 19; Russell vs. Swan, 16 Mass., 314; Hooker vs. Gallagher, 6 Fla., 351.

<sup>7</sup> Alabama Co. vs. Brainard, 35 Ala., 476.

<sup>8</sup> Sanford vs. Mickles, 4 Johns., 224.

<sup>9</sup> Abel vs. Suttan, 3 Est., 108; Humphries vs. Chastain, 5 Ga., 166; Foltz vs. Pouree 2 Desaussure Eq., 40; Parker vs. Macumber, 18 Pick., 505.

<sup>10</sup> Cony vs. Wheelock, 33 Maine, 366; Lewis vs. Reilly, 1 Q. B., 349.

apply where the bill or note of the firm was made payable to the partner who, after dissolution, indorsed it.<sup>1</sup>

§ 21. If several persons, not partners, are payees or indorsees of a bill or note, it must be indorsed by all of them.<sup>2</sup> Either one of the joint payees may authorize the other to indorse for him, and an assignment of this interest in the paper from one to the other, carries with it such authority.<sup>3</sup> But there is no presumption of law that one may indorse for the other.<sup>4</sup>

If the instrument be payable to two or more persons as executors or administrators, all must indorse;<sup>5</sup> but it seems that in other cases one of the personal representatives might indorse.<sup>6</sup> An executor or administrator will be personally bound by his indorsement, although he add "Executor" or "Administrator" to his name, unless he expressly specify that recourse is to be had only against the estate of the deceased.<sup>7</sup>

When a bill or note is payable at a bank, an indorsement by "A. B., Pres't," binds the bank.<sup>8</sup>

#### TO WHOM TRANSFER MAY BE MADE.

§ 22. The transfer of a bill or note may be made of course to any party who may legally contract with the transferrer. It may also be made to an infant, or to a married woman; but in the latter case the interest will vest in her husband, who may treat it as payable to himself, or to himself and wife.<sup>9</sup> In the latter case, should she survive him, she may sue in her own name. It may also be made to a trustee, or personal representative, in which case it will operate as a transfer to them personally, although the trust may attach to the proceeds in their hands.<sup>10</sup>

If the transfer be to an executor or trustee, it will operate as a transfer to him personally, although the trust may attach to the pro-

<sup>1</sup>Temple vs. Seaver, 11 Cush., 314.

<sup>2</sup>Smith vs. Whiting, 9 Mass., 334; Sneed vs. Mitchell, 1 Haywood, 289; Carvick vs. Vickery, 2 Doug., 653. See Sayre vs. Frick, 7 Watts & S., 383.

<sup>3</sup>Russell vs. Swan, 16 Mass., 314; Goddard vs. Lyman, 14 Pick., 268.

<sup>4</sup>3 Parsons N. & B., 5.

<sup>5</sup>Smith vs. Whiting, 9 Mass., 334.

<sup>6</sup>Wheeler vs. Wheeler, 9 Cowen, 34. See 2 Pars., N. & B., 6.

<sup>7</sup>See *ante* Beals vs. See, 10 Barr, 56; Seaver vs. Phelps, 11 Pick., 304; Serle vs. Waterworth, 4 M. & W., 487.

<sup>8</sup>Aiken vs. Marine Bank, 16 Wis., 679.

<sup>9</sup>Story on Notes, § 126; Richards vs. Richards, 2 Barn. & Ad., 477; Burrough vs. Moss, 10 Barn. & Cres., 558; Phillis kirk vs. Pluckwell, 2 M. & Selw., 393.

<sup>10</sup>*Ibid.*

ceeds in his hands.<sup>1</sup> If a principal make an indorsement in blank to his agent, the latter may fill it up to himself individually, and it will be so regarded as between him and all other parties, except his principal, as his own; or he may fill it for his principal, and act in his name.<sup>2</sup> The indorsee must, of course, be living at the time of the indorsement; and if he be dead, and the indorsement be with intention to invest his personal representative with the legal property in the instrument, it is null and void.<sup>3</sup>

A promissory note payable to "J. C., Sh'ff," (sheriff,) and indorsed "J. C., Sh'ff," does not of itself impart notice to the indorsee that the money was payable to J. C. in his official capacity as sheriff, or as trustee for other parties.<sup>4</sup>

§ 23. If a bill or note be made payable to a party as "Cashier," it will be regarded *prima facie* as payable to his bank—and if so indorsed, as indorsed by his bank.<sup>5</sup> In cases of indorsement to a cashier of a bank as cashier, for example, "to A. B., Cashier," the bank may sue on it, or the cashier may do so for the use of the bank, or in his own name.<sup>6</sup> And if the indorsement be to the Treasurer of the United States, in his official capacity, it will be regarded as to the United States in point of fact, and they may sue upon it in their name.<sup>7</sup>

## VARIETIES OF INDORSEMENT.

### *Indorsement in Full.*

§ 24. There are various liabilities which may be ingrafted on a negotiable instrument, evidenced by the terms of the indorsement thereon. An indorsement may be in full or in blank; it may be absolute or conditional; it may be restrictive; it may be without recourse on the indorser; and there may be successive indorsements of the instrument.

An indorsement in full is one which mentions the name of the per-

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<sup>1</sup>Richards *vs.* Richards, 2 Barn. & Adolph, 447.

<sup>2</sup>Clark *vs.* Pigot, 1 Salk., 126; Story on Bills, § 207.

<sup>3</sup>Valentine *vs.* Holloman, 63 N. C., 475.

<sup>4</sup>Fletcher *vs.* Schaumburg, 41 Misso., 501.

<sup>5</sup>Bank of the State *vs.* Muskingum Branch Bank, 29 N. Y., (2 Tiffany,) 619; Collins *vs.* Johnson, 16 Ga., 458; Bank of Manchester *vs.* Slasen, 13 Verm., 334; Folger *vs.* Chase, 18 Pick., 63; Fleckner *vs.* Bank U. S., 8 Wheat, 360; Minor *vs.* Mechanics Bank, 1 Peters, 46; Wild *vs.* Passamaquoddy Bank, 3 Mason, 505.

<sup>6</sup>McHenry *vs.* Ridgeley, 3 Scam., 309; Porter *vs.* Nekerois, 4 Rand., 359; Fairfield *vs.* Adams, 16 Pick., 381.

<sup>7</sup>Dugan *vs.* U. S., 3 Wheat, 172.

son in whose favor it is made; and to whom, or to whose order, the sum is to be paid. For instance: "Pay to B., or order," signed A., is an indorsement in full by A., the payee or holder of the paper, to B. An indorsement in full prevents the bill or note from being indorsed by any one but the indorsee.<sup>1</sup>

*Indorsement in Blank.*

§ 25. An indorsement in blank is one which does not mention the name of the indorsee, and consists, generally, simply of the name of the indorser written on the back of the instrument. When the bill or note is indorsed in blank, it is, as has been said, transferable by mere delivery to the transferee; but one indorsed in full must be indorsed again by the indorsee, in order to render it transferable to every intent—for he who indorses to a particular person, declares his intention not to be made liable except by that person's indorsement over. As to an indorsement in blank, it was said by Lord Mansfield in *Peacock vs. Rhodes*, 2 Doug., 633: "I see no difference between a note indorsed in blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases."

The receiver of a negotiable instrument indorsed in blank, or any *bona fide* holder of it, may write over it an indorsement in full to himself, or to another, or any contract consistent with the character of an indorsement;<sup>2</sup> but he could not enlarge the liability of the indorser in blank by writing over it a waiver of any of his rights such as demand and notice.<sup>3</sup> The indorsement may be before or after the instrument itself is completed, and while it is yet in blank; and the indorser will be bound according to its terms when filled up, the indorsement of a blank paper being considered "a letter of credit for an indefinite sum."<sup>4</sup>

Where there are several blank indorsements in blank, the holder may fill up the first one to himself, or he may deduce his title through all of them.<sup>5</sup> He may also strike out any number of several indorse-

<sup>1</sup>Mead vs. Young, 4 T. R., 28.

<sup>2</sup>Evans vs. Gee, 11 Peters, 80; Rees vs. Conococheague Bank, 5 Rand., 329; Hance vs. Miller, 21 Ill., 636; Hunter vs. Hempstead, 1 Misso., 67; Riker vs. Cosby, 2 Penn., 911; Central Bank vs. Davis, 19 Pick., 376; Tenney vs. Prince, 4 Pick., 385.

<sup>3</sup>2 Parsons, N. & B., 20.

<sup>4</sup>Violette vs. Patton, 5 Cranch, 142; Lord Mansfield in Russell vs. Langstaffe, 2 Doug., 514. See *ante*.

<sup>5</sup>Ritchie vs. Moore, 5 Munf., 388; Craig vs. Brown, Peters C. C. R., 171; Ellsworth vs. Brewer, 11 Pick., 316; Cole vs. Cushing, 8 Pick., 48; Emerson vs. Cutts, 12 Massachusetts, 7, 8.

ments. Thus, if there were six, he might strike out the fourth, fifth and sixth, and sue the others;<sup>1</sup> but if he strikes out any intermediate one he releases all who indorsed subsequently, as he deprives them of their recourse against him.<sup>2</sup> But where there is a special indorsement to a particular person, it has been held that the holder can not strike it out, and insert his own.<sup>3</sup>

It has been held, that if a holder, through several indorsements, fills up an early blank indorsement payable to himself, *without striking out the subsequent indorsements*, he does not discharge such subsequent indorsers; but that he may, after suing unsuccessfully those prior to the one filled up to himself, sue the subsequent indorsers.<sup>4</sup>

§ 26. In *Rees vs. Conococheague Bank*, 5 Rand., 329, Green, J., said, in delivering the opinion of the court: "A blank indorsement does not *per se* transfer a title,<sup>5</sup> but is an authority to the holder, either to hold it as the agent of the indorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignor. The blank indorsement is conclusive proof of the assent of the indorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the indorsement as a transfer, is proved as well by suing upon it in his own name as by writing over it an assignment to himself, and it is the assent of both parties to the transfer which perfects it, and not the form in which that assent is evidenced."

§ 27. If a bill or note be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, acceptor, maker, payee, the blank indorser and all indorsers before him be payable to bearer, though as against the special indorser himself, title must be made through his indorsee.<sup>6</sup>

#### ABSOLUTE AND CONDITIONAL INDORSEMENTS.

§ 28. An absolute indorsement is one by which the indorser binds himself to pay, upon no other condition than the failure of prior parties to do so, and of due notice to him of such failure. A conditional indorsement is one by which the indorser annexes some

<sup>1</sup>Ritchie vs. Moore, 5 Munf., 388.

<sup>2</sup>Curry vs. Bank of Mobile, 8 Porter, Alabama, 360.

<sup>3</sup>Porter vs. Cushman, 19 Illinois, 572.

<sup>4</sup>2 Parsons N. & B., 19; Co'e vs. Cushing, 8 Pick., 48. See note 2, Parsons N. & B., 19, and the observations of the author on the case cited.

<sup>5</sup>See Clark vs. Pigot, 1 Salkeld, 126; Lucas vs. Haynes, *Id.*, 130.

<sup>6</sup>Smith vs. Clarke, Peake, 225; Walker vs. McDonald, 2 Exch., 527.

other condition to his liability. Sometimes the condition is precedent, and sometimes subsequent. Thus, "pay to A. B., or order, if he arrives at twenty-one years of age," or "if he is living when it becomes due," is an indorsement upon a condition precedent. "Pay A. B., or order, unless before payment, I give you notice to the contrary," is upon a condition subsequent. The condition attached to the indorsement, in no manner affects the negotiability of the paper.<sup>1</sup>

When a bill was indorsed, payable to the indorsee or transferee on a certain condition, and was afterwards accepted and passed through several hands, and was finally paid by the acceptor before the condition was satisfied, it was held that the acceptor was liable to pay the bill again to the payee.<sup>2</sup> But it seems that a bill can not be indorsed with a condition that in a certain event the indorsee shall not retain the power of further indorsing it to another.<sup>3</sup>

#### RESTRICTIVE INDORSEMENTS.

§ 29. An indorsement may be worded as to restrict the farther negotiability of the instrument, and is then called a restrictive indorsement. Thus, "pay the contents to J. S., only," or "to J. S., for my use," or "to order, for my use," are restrictive indorsements, and put an end to the paper's transferability.<sup>4</sup> The addition of the words "for collection," which are frequently inserted on paper put in bank to be collected, makes the indorsement restrictive, and the indorser is competent to prove that he is not the owner of it, and did not mean to give title to it, or its proceeds when collected.<sup>5</sup>

The negotiability of an instrument having been restricted, it may be revived by a subsequent indorsement.<sup>6</sup>

If the paper be originally negotiable, an indorsement, in order to be restrictive, must be made so by express words, and if it simply direct payment to a certain person by name, without adding the words, "or order," it will not be considered a restrictive indorsement and payable to him only.<sup>7</sup>

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<sup>1</sup> Story on Notes, § 149.

<sup>2</sup> Robertson *vs.* Kensington, 4 Taunt., 30; Savage *vs.* Aldren, 2 Stark, 232, (3 E. C. L. R.)

<sup>3</sup> Soares *vs.* Clyn, 14 L. J.; Q. B., 513; 8 Q. B., 24, (35 E. C. L. R.)

<sup>4</sup> Power *vs.* Finnie, 4 Call., 411; Brown *vs.* Jackson, 1 W. C. C. R., 512; Ancher *vs.* Bank of England, Doug., 615; Robertson *vs.* Kensington, 4 Taunt., 30; Sigourney *vs.* Lloyd, 8 B. & C., 622; Snee *vs.* Prescott, 1 At. K., 247.

<sup>5</sup> Sweeney *vs.* Easter, 1 Wallace, 166. <sup>6</sup> Holmes *vs.* Hooper, 1 Bay., 164.

<sup>7</sup> Leavitt *vs.* Putnam, 3 Comstock, 494; Story on Notes, § 142; Story on Bills, § 19, 56.



An indorsement "for my use," or "for collection"—not being an actual transfer of the amount—may be recalled at pleasure.<sup>1</sup> All the presumptions are against restrictions to negotiable paper, and unless clearly restrictive the indorsement will be held otherwise.<sup>2</sup>

#### QUALIFIED INDORSEMENTS, OR INDORSEMENTS WITHOUT RECOURSE.

§ 30. An indorsement qualified by the words "*without recourse*," or "at the indorsee's own risk," renders the indorser a mere assignor of the title to the instrument, and relieves him of all responsibility for its payment,<sup>3</sup> but such an indorsement does not throw any suspicion upon the character of the paper. As said in *Lomax vs. Picot*, 2 Rand., 260, by Green, J.:

"An indorsement without recourse is not out of the due course of trade. The security continues negotiable, notwithstanding such an indorsement. Nor does such an indorsement indicate, in any case, that the parties to it are conscious of any defect in the security, or that the indorsee does not take it on the credit of the other party, or parties to the note. On the contrary, he takes it solely on their credit, and the indorser only shows thereby that he is unwilling to make himself responsible for the payment."

"I transfer all my right and title to the within note, to be enjoyed in the same manner as may have been by me," has been held in effect an indorsement without recourse.<sup>4</sup> The words "without recourse," written under the signature of one not the payee, upon the back of a note are regarded as surplus and ineffectual.<sup>5</sup>

§ 31. Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument;<sup>6</sup> but this principle, although conceded on all sides to be applicable to all contracts written out in full, it has been held, in some cases, does not apply to those which are raised by operation of law—such as an indorsement

<sup>1</sup> Thomson on Bills, (Wilson's Ed.) 184; Marius, 72.

<sup>2</sup> Potts vs. Read, 6 Esp., 57; Treuttel vs. Baraudon, 8 Taunt, 100.

<sup>3</sup> Welch vs. Linds, Cranch S. C., 159; 1 Math. Dig, 411; Chitty on Bills, 179; Byles on Bills, 117; Wilson vs. Codman's Ex., 3 Cranch, 193; Rice vs. Stearns, 3 Mass., 225; Upham vs. Prince, 12 Id., 14; Richardson vs. Lincoln, 5 Metcalf, 201; Mott vs. Hicks, 1 Cowen, 512; Craft vs. Fleming, 10 Wright, 140; Lawrence vs. Dobyn, 30 Miss., 196; Fitchburg Bank vs. Greenwood, 2 Allen, 434; Cady vs. Shepard, 12 Wisconsin, 639; Davenport vs. Schram, 9 Wisc., 119.

<sup>4</sup> Hailey vs. Falconer, 32 Ala., 536.

<sup>5</sup> Childs vs. Wyman, 44 Maine, 433; Lowell vs. Gage, 38 Maine, 35.

<sup>6</sup> 1 Greenleaf Ev., §§ 277, 281, 282.



in blank.<sup>1</sup> There is no just ground for this distinction.<sup>2</sup> The indorsement seldom consists of anything more than the indorser's signature; but if the agreement imported by that signature were written out in full above it, the undertaking of the indorser would not be more clearly defined than it is by the signature itself. Its presence there is as plain a manifestation of the intention of the party, as if it were set forth in express words, and parol evidence should not be admitted to vary or contradict it.<sup>3</sup>

In the application of this principle to indorsements in blank, it has been held that in an action by an indorsee against his immediate indorser it is not admissible for the latter to introduce parol evidence to show that it was agreed, when he indorsed the instrument, that he should not be liable until certain estates were sold,<sup>4</sup> or that his liability was otherwise conditional, and not absolute,<sup>5</sup> or that it was given only to be negotiated at a certain bank.<sup>6</sup>

Nor could the indorser show that he was not to be considered personally liable, and that the indorsement was "without recourse,"<sup>7</sup> or that his liability was to be that of a guarantor;<sup>8</sup> nor could the indorsee show by parol evidence that at the time of indorsement the indorser agreed to be liable without the holder making demand on the maker at maturity.<sup>9</sup>

The language of the rule as stated in the text implies its limitation, for it does not extend to exclude parol evidence to show fraud, or want or failure of consideration, which impeach the original or present validity of the indorsement. Such evidence does not vary or contradict the liability imported by the contract, but impeaches it as a contract.<sup>10</sup> Therefore, it is admissible between the parties for

<sup>1</sup> Perkins *vs.* Catlin, 11 Conn., 213; Hill *vs.* Ely, 5 Sergt. & R. 363; Susquehanna Co. *vs.* Evans, 4 Wash., C. C. 480; Smith *vs.* Barber, 1 Root., 207.

<sup>2</sup> Woodward *vs.* Foster, 18 Grat., 205; Brown *vs.* Wiley, 20 Howard, 442.

<sup>3</sup> Bayley on Bills, (Am. Ed.) 363; 2 Parsons, N. & B. 23, 24, and 520.

<sup>4</sup> Free *vs.* Hawkins, 8 Taunt., 92.

<sup>5</sup> Bank U.S. *vs.* Dunn, 6 Peters, 51; Woodward *vs.* Foster, 18 Grat., 200.

<sup>6</sup> Stubbs *vs.* Goodall, 4 Ga., 106.

<sup>7</sup> Woodward *vs.* Foster, 18 Grat., 200; Wilson *vs.* Black, 6 Blackt., 509; Crocker *vs.* Getchell, 23 Maine, 392; Contra Hill *vs.* Ely, 5 Sergt. & Rawle, 363; Patterson *vs.* Todd, 18 Penn. St., 426; Bircleback *vs.* Wilkins, 22 Penn. St. 26.

<sup>8</sup> Howe *vs.* Merrill, 5 Cush, 80; Fuller *vs.* McDonald, 8 Greenl.; 213; Dibble *vs.* Duncan, 2 McLean, 353.

<sup>9</sup> Bank of Albion *vs.* Smith, 27 Barb., 489; Barry *vs.* Morse, 3 N. H., 132; Free *vs.* Hawkins, 8 Taunt., 92. See Story on Prom. Notes, § 118; *Contra*.

<sup>10</sup> Greenleaf on Ev., M. S., § 284; Foster *vs.* Jolly, 1 C. M. & R., 703; Pike *vs.* Street 1 Mood. & M., 226, (22 E. C. L. R.); Woodward *vs.* Foster, 18 Grat., 200.

the indorser to show that there was no consideration for the indorsement;<sup>1</sup> or that the instrument was indorsed and handed over for a particular purpose, as for collection without giving to the trustee the usual rights of an indorsee;<sup>2</sup> or that it was transferred as an escrow, or upon an express condition which has not been complied with.<sup>3</sup>

The English case in which it was held that the indorser could show a parol agreement by the indorsee not to sue him, but the acceptor only,<sup>4</sup> has led to the statement of a very different rule from that of the text by Byles in his excellent treatise;<sup>5</sup> but the more recent authorities, and, as it seems to us, the best considered, fully sustain the principle herein laid down; and that case, if indeed at all reconcilable with the others cited, can only be supported upon the idea that the evidence impeached the consideration.<sup>6</sup>

<sup>1</sup> *Ibid*; Smith vs. Carter, 25 Wisc., 283.

<sup>2</sup> Manley vs. Boycot, 2 El. & Bl., 46, (75 E. C. L. R.); Hoare vs. Graham, 3 Camp., 57.

<sup>3</sup> Bell vs. Lord Ingestre, 12 Q. B., 317, (64 E. C. L. R., 10); Ricketts vs. Pendleton, 14 Md., 320; Wallis vs. Littell, 11 Com. B., 369.

<sup>4</sup> Pike vs. Street, 1 Mood. & Malk., 226, (22 E. C. L. R.)

<sup>5</sup> In Byles on Bills (Sharswood's ed.,) 267, it is said: "The contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser, and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade from the course of dealing between the parties or from their relative situation": Kidson vs. Dilworth, 5 Price, 564; Castrique vs. Battigieg, 10 Moore, P. C. cases, 94.

<sup>6</sup> Woodward vs. Foster, 18 Grat., 205, in which case it was said, in delivering the opinion of the court by Joynes, J.: "When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes, as distinctly, and as fully expressed, as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet, where the law attaches to it a clear, unequivocal, and definite import, the contract imported by it can no more be varied, or contradicted by evidence of a contemporaneous parol agreement, than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same, in such cases, as if the terms implied by law had been expressed. \* \* \* In Pike vs. Street, 1 Mood. & Malk. R., 226, (22 E. C. L. R., 299,) tried before Lord Tenterden, at *Nisi Prius*, the action was brought by the indorsee of a bill of exchange against his immediate indorser. The defense was, that though the plaintiff gave value to the defendant, it was upon a verbal agreement that he should sue the acceptor only, and that he should not sue the defendant as indorser. Lord Tenterden held that such an agreement, if proved, would be

## SUCCESSIVE INDORSEMENTS.

§ 32. When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. The indorsers may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them.<sup>1</sup>

The indorser is not necessarily bound according to the actual time of indorsation, but according to the contract; and if it appear that the instrument was indorsed by one party with the agreement that another should become prior indorser, the latter will be held responsible first in point of contract though second in point of time.<sup>2</sup>

Where a note is indorsed by payee and by a third party, the legal inference is that the payee is prior indorser, but it may be proved otherwise by parol evidence.<sup>3</sup>

There is no limit to the number of indorsements, and if there be not room to write them all on the instrument, they may be written on a piece of paper fastened thereto, which is called in French an "allonge," and is thenceforth considered a part of the bill.<sup>4</sup>

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a good bar to the action. This case was cited by counsel in *Foster vs. Jolly*, 1 C. M. & R., 703, as an authority to show that evidence of a cotemporaneous parol agreement might be given to vary the written contract of an indorser. But Parke B. said that that case fell within the cases in which the consideration is contradicted; the evidence went to show that there was no consideration as between the plaintiff and the defendant. Whether this observation was or was not justifiable by the facts of the case, it indicates the ground upon which alone, in the opinion of a judge of the greatest learning and eminence, the opinion of Lord Tenterden can be sustained."

<sup>1</sup> *Hogue vs. Davis*, 8 Grat., 4; *Bank U. S. vs. Beirne*, 1 Grat., 265; *Farmers' Bank vs. Vanmeter*, 4 Rand., 553; *Chalmers vs. McMurdo*, 5 Munf., 252; *McCarty vs. Roots*, 21 Howard, 432; *Rey vs. Simpson*, 22, *Id.*, 350; *Phillips vs. Preston*, 5 Howard, 278; *McDonald vs. Magruder*, 3 Peters, 470; *Moody vs. Findley*, 43 Ala., 167; *McCune vs. Belt*, 45 Misso., 174.

<sup>2</sup> *Chalmers vs. McMurdo*, 5 Munf., 252.

<sup>3</sup> *Cady vs. Shepherd*, 12 Wisc., 639.

<sup>4</sup> *French vs. Turner*, 15 Indiana, 59; *Byles on Bills*, 263; *Folger vs. Chase*, 18 Pick, 63; *Crosby vs. Roul*, 16 Wisc., 616.

A third indorser having indorsed a note on the faith of the solvency of a prior indorser; and on a renewal of the note the order of the indorsements having been changed without the consent of this third indorser, who for the convenience of renewing the note, left his blank indorsement with the makers; a court of equity will relieve him as against the indorser who should have preceded him.<sup>1</sup>

§ 33. There is sometimes a difficulty in determining whether or not a party stands in the relation of an indorser to the paper, or in that of an original maker, or surety, or guarantor; and there is great diversity on the decisions of the State tribunals. In those States, where a note payable to bearer is negotiable, if a third person put his name on the back of it, without more, he is liable as an indorser, and can be charged only by due demand and notice.<sup>2</sup>

But when one not a party to a negotiable note indorses his name in blank on the back of it before it is delivered to or indorsed by the payee, a question is presented which has caused much disputation. In the case of a non-negotiable note, such a person may be regarded as a surety or guarantor,<sup>3</sup> there being no such thing as "indorsement" of non-negotiable paper, in the commercial sense of the word;<sup>4</sup> but when the note is negotiable, it has been held in many cases that the character of the liability incurred is to be ascertained by considering all the attendant circumstances.

§ 34. When the paper is sued upon by a *bona fide* holder, and it does not appear from extraneous evidence (if, indeed, it be admissible) in what manner the person who wrote his name on the back of it intended to bind himself, it has been held in many of the States that he is an indorser, and as such entitled to notice of dishonor and all other privileges of an indorser.<sup>5</sup> This we consider the correct view, and supporting it are the decisions in New York,<sup>6</sup>

<sup>1</sup> Slagle vs. Rust's Admr., 4 Grat., 274; Slagle vs. Bank of Valley, *Id.*

<sup>2</sup> Hall vs. Newcomb, 7 Hill, 416; Brush vs. Reeves Admrs., 3 Johns., 439; Eccles vs. Ballard, 2 McCord, 388; Allwood vs. Haselders, 2 Bailey, 457.

<sup>3</sup> Watson vs. Hurt, 6 Grat., 633; Griswold vs. Slocum, 10 Barb., 402; Cooley vs. Lawrence, 4 Martin, 639.

<sup>4</sup> Orrick vs. Colston, 7 Grat.; Watson vs. Hurt, 6 Grat., 633.

<sup>5</sup> See Story on Notes, § 134; 2 Pars., N. & B., 120.

<sup>6</sup> Hall vs. Newcomb, 7 Hill, 416; Spies vs. Gilmore, 1 Comstock, 32; Ellis vs. Brown, 6 Barb., 282; Waterbury vs. Sinclair, 26 Barb., 455; See Par. N. & B.; These cases overrule the earlier New York cases; See Herrick vs. Carman, 12 Johns., 159; Campbell vs. Butler, 14 *Id.*, 349.

Virginia,<sup>1</sup> Tennessee,<sup>2</sup> Mississippi,<sup>3</sup> Iowa,<sup>4</sup> Indiana,<sup>5</sup> California,<sup>6</sup> Wisconsin.<sup>7</sup>

In other cases it has been held that such a party is *prima facie* liable as a joint maker,<sup>8</sup> and some of them as a guarantor or surety using the term as equivalent to maker;<sup>9</sup> while others decide that he is liable as a guarantor.<sup>10</sup>

In *Greenough vs. Smead*, 3 Ohio State R., 415, it was held that if one not a party put his name on the back of a note, which is subsequently indorsed by the payee below his signature, but not being intended for the payee, such party is to be regarded as an indorser; but if the note were intended for the payee, the liability of such third person is that of maker or guarantor.<sup>11</sup>

§ 35. In Massachusetts, where such person is regarded as a surety, it has been held that if the payee afterwards indorse above the signature of the third party, the latter then becomes an ordinary indorser;<sup>12</sup> and that if the signature is written subsequently to the execution of

<sup>1</sup> *Watson vs. Hurt*, 6 Grat., 633. This case seems to be misapprehended by Prof. Parsons, (2 N. & B., 120, note E.,) who cites it as holding that such third person is *prima facie* regarded as guarantor. The court expressly says that if the note be *negotiable*, the party is an indorser, and a guarantor if it be non-negotiable.

<sup>2</sup> *Clonston vs. Barbieri*, 4 Sneed, 336; *Comparree vs. Brockway*, 11 Humph., 355.

<sup>3</sup> *Jennings vs. Thomas*, 13 Smedes and M., 617.

<sup>4</sup> *Fear vs. Dunlop*, 1 Greene, 331.

<sup>5</sup> *Sill vs. Leslie*, 16 Indiana, 236; *Vore vs. Hurst*, 13 *Id.*, 551; *Wells vs. Jackson*, 6 Blackft., 40.

<sup>6</sup> *Riggs vs. Waldo*, 2 Cal., 485; *Pierce vs. Kennedy*, 5 Cal., 138.

<sup>7</sup> *King vs. Ritchie*, 18 Wisc., 615; *Heath vs. Vancott*, 9 Wisc., 516.

<sup>8</sup> *Sylvester vs. Downer*, 20 Vt., 355; *Knapp vs. Parker*, 6 Vt., 642; *Baker vs. Briggs*, 8 Pick., 122; *Union Bank vs. Willis*, 8 Met., 504; *Draper vs. Weld*, 13 Gray, 580; *Hawkes vs. Phillips*, 7 Gray, 284; *Weatherwax vs. Paine*, 2 Mich., 555; *Schneider vs. Schiffman*, 20 Misso., 571; *Lewis vs. Harvey*, 18 Misso., 74; *Childs vs. Wyman*, 44 Maine, 433; *Martin vs. Boyd*, 11 N. H., 385; *Carpenter vs. Oaks*, 10 Rich. (Law, 17.)

<sup>9</sup> *Cook vs. Southwick*, 9 Texas, 615; *Carr vs. Rowland*, 14 Texas, 275; *McGuire vs. Bosworth*, 1 La. Ann., 248.

<sup>10</sup> *Camden vs. McKoy*, 3 Scammon, 437; *Cushman vs. Dement*, 4 Scammon, 497; *Carroll vs. Weld*, 13 Ill., 682; *Klein vs. Currier*, 14 Ill., 237; *Webster vs. Cobb*, 17 Ill., 459; *Clark vs. Merriam*, 25 Conn., 576; See Story on Notes, § 133.

<sup>11</sup> To same effect are *Seymour vs. Leyman*, 10 Ohio St., 283; *Peckam vs. Gilman*, 7 Minn., 446; *Quin vs. Sterne*, 26 Ga., 223; *Perkins vs. Barstow*, 6 R. I., 505.

<sup>12</sup> *Clapp vs. Rice*, 13 Gray, 403; *Howe vs. Merrill*, 5 Cush., 80; *Vose vs. Hust*, 13 Indiana, 551.

the paper, and as an independent transaction, the signer is a guarantor.<sup>1</sup>

When a negotiable note is indorsed by one not a party, the presumption is that he indorsed for the accommodation of the prior parties, and that no liability attaches to him so long as the note remains in the hands of the payee.<sup>2</sup>

In Scotland, if one not payee indorse a bill in his own name, he is liable as a new acceptor; and if such a person indorse a note he is liable as a joint maker.<sup>3</sup> In England, it seems such a person should be sued as a guarantor.<sup>4</sup>

§ 36. Whatever diversities of interpretation may be found in the authorities as to the liability incurred by the third person indorsing his name on the paper prior to the payee, there is one principle almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties;<sup>5</sup> and in most cases it is conceded that the intention of the parties may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. Parol proof is admitted on the ground as stated by the U. S. Supreme Court in *Rey vs. Simpson*, 22 How., 341, that whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in

<sup>1</sup>*Benthall vs. Judkins*, 13 Met., 265; *Irish vs. Cutter*, 31 Maine, 536.

<sup>2</sup>*Barto vs. Schmeck*, 4 Casey, 447; *Schollenberger vs. Nehf*, 4 Casey, 189.

<sup>3</sup>*Thomson on Bills*, (Wilson's Ed.,) 174.

<sup>4</sup>*Widders vs. Stevens*, 15 L. J., (Exch.,) 108. But see *Mathews vs. Bloxsome*, 33 L. J., (Q. B.,) 209.

<sup>5</sup>In *Rey vs. Simpson*, 22 How., 341, the U. S. Supreme Court said: "When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promiser, guarantor or indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place.

I. If he put his name on the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

II. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor.

III. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers."

connection with the surrounding circumstances and the subject matter, in order to reach the true intention of the parties.

The weight of authority recognizes the admissibility of parol proof,<sup>1</sup> even when the paper is in the hands of a subsequent indorsee;<sup>2</sup> but some of the decisions while recognizing the general principle, do not allow its application to that extent,<sup>3</sup> and this limitation we consider the correct doctrine.

In Massachusetts, it is held that where it appears presumptively or by direct proof, that the signature was contemporaneous with the making, no proof of intention is admissible;<sup>4</sup> and in Kentucky, proof of intention is confined to ascertain whether the party is guarantor or indorser.<sup>5</sup>

#### AT WHAT TIME NEGOTIABLE PAPER MAY BE TRANSFERRED.

§ 37. As to the time of transfer, negotiable paper, whether made for accommodation or otherwise, may be transferred by indorsement or by delivery, (as the case may be,) either before it has fallen due or afterwards.<sup>6</sup> Negotiable paper does not lose its negotiable character by being dishonored for non-payment or non-acceptance.<sup>7</sup>

It still passes from hand to hand *ad infinitum*, until paid. Moreover, the indorser, after maturity, writes in the same form, and is

<sup>1</sup>Rey vs. Simpson, 22 Howard, 341; McCarty vs. Roots, 21 Howard, 432; Phillips vs. Preston, 5 Howard, 278; McDonald vs. Magruder, 3 Peters, 470; Hogue vs. Davis, 8 Grat., 4, Bank U. S. vs. Beirne, 1 Grat., 265; Farmers' Bank vs. Vanmeter, 4 Rand., 553; Chalmers vs. McMurdo, 5 Munf., 252; Clark vs. Merriam, 25 Conn., 576, Schollenberger vs. Nehf, 28 Penn. St., 189; Carroll vs. Weld, 13 I. U., 682; Cottrell vs. Conklin, 4 Duer., 45; Lewis vs. Harvey, 18 Misso., 74; Barrows vs. Lane, 5 Vt., 161; Sylvester vs. Downer, 20 Vt., 355; Greenough vs. Smead, 3 Ohio St., 415; Jennings vs. Thomas, 13 Sm. & M., 617; Beckwith vs. Angell, 6 Conn., 315; Fear vs. Dunlap, 1 Greene (Iowa) 331.

<sup>2</sup>Carpenter vs. Oakes, 10 Rich., (Law) 19. The ground taken in Rey vs. Simpson, 22 Howard, 341, is broad enough to cover this doctrine, and it is held in many of the cases cited in previous note.

<sup>3</sup>Schneider vs. Schiffman, 20 Mo., 571; Draper vs. Weld., 13 Gray, 580.

<sup>4</sup>Essex Company vs. Edmonds, 12 Gray, 273; Bigelow vs. Colton, 13 Gray, 309; Lake vs. Stetson, *Id.*, 310; Pearson vs. Stoddard, 9 Gray, 337.

<sup>5</sup>Kellogg vs. Dunn, 2 Met., (Ky.) 215.

<sup>6</sup>Dehers vs. Harriott, 1 Shew., 163; Mutford vs. Walcott, Lord Raym., 575; Charles vs. Mursden, 1 Taunt., 224; Graves vs. Kay, 3 B. & Ad., 313; Stein vs. Yglesias, 3 Dowl., 252. The fact of its being an accommodation bill does not prevent its being negotiable when overdue: 2 Rob. Prac. (N. Ed.,) 252. Thomson on Bills, (Wilson's ed.,) 178.

<sup>7</sup>Davis vs. Miller, 14 Grat., 1; Baxter vs. Little, 6 Metc., 7; Britten vs. Bishop, 11 Vt., 70; Leavitt vs. Putnam, 3 Comstock, 494; Powers vs. Neeson, 19 Mo., 190.



bound only upon the same condition of demand upon the drawer and notice of non-payment as any other indorser. The paper retains its commercial attributes, and circulates as such in the community; but there is this vital distinction between the rights of a transferee who received the paper before, and of one who received it after maturity: The transferee of negotiable paper to whom it is transferred after maturity, acquires nothing but the actual right and title of the transferer;<sup>1</sup> and the like rule applies to the transferee who takes the paper after a refusal to accept by the drawee, provided he had notice of such refusal.<sup>2</sup> In other words, the transferee of negotiable paper refused acceptance, (with notice thereof,) or overdue, takes it subject to all the equities with which it was encumbered in the hands of the party from whom he received it; for it comes, to use Lord Ellenborough's words, "disgraced as to him." Thus, if he took it from a thief or finder, he could not recover on it, inasmuch as the thief or finder could not.<sup>3</sup>

Where several notes are secured by mortgage, and the indorsee receives one *overdue*, he is not thereby affected with equities as to the other.<sup>4</sup>

#### DEFENSES, SUBJECT TO WHICH THE INDORSEE OF OVER-DUE PAPER TAKES IT.

§ 38. The modern English doctrine is that the indorsee of an over-due bill or note takes it subject to equities arising out of the transaction in which the instrument was executed, and not to a set-off arising out of collateral matters; in other words, he takes the paper subject to *its equities*. This doctrine was settled in England by the case of *Burrough vs. Moss*, 10 Barn. & C., 558, (21 E. C. L. R., 128,) 1830, and has been uniformly followed,<sup>5</sup> and applies even though the indorsee had notice, gave no consideration, and took the paper on purpose to defeat the set-off.<sup>6</sup>

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<sup>1</sup>Texas vs. Hardenburg, 10 Wall., 68; Murray vs. Lardner, 2 Wall.,; Smith vs. Foley, 6 Wall., 492; Arents vs. Commonwealth, 18 Grat., 750; Davis vs. Miller, 14 Grat., 1; Clarke vs. Deaderick, 31 Md., 148; Merrick vs. Butler, 2 Lansing, (N. Y.,) 103; Livermore vs. Blood, 40 Mo., 48; Thomas vs. Kinsey, 8 Geo., 421.

<sup>2</sup>O'Keefe vs. Dunn., 6 Taunt., 305, (1 E. C. L. R.,) 5 M. & S., 282; Whitehead vs. Walker, 11 L. J. Exch., 168, 9 M. & W., 506; Bartlett vs. Benson, 14 M. & W., 733.

<sup>3</sup>Byles on Bills, (Sharswood's Ed.,) 284.

<sup>4</sup>Boss vs. Hewitt, 15 Wisc., 260.

<sup>5</sup>Steen vs. Yglesias, 1 Crompt. M. & R., 565; Holmes vs. Kidd, 28 L. J., 113, 3 H. & N., 891; Whitehead vs. Walker, 10 Mees. & Wel., 696.

<sup>6</sup>Byles on Bills, (Sharswood's ed.,) 286; Oulds vs. Harrison, 24 L. J. Exch., 66; S. C., 10 Exch., 572.



The doctrine of *Burrough vs. Moss* has been followed in most of the United States in which the question has been presented, as remarked in *Davis vs. Miller*, 14 Grat., 8, and may be considered a fixed principle of commercial law.<sup>1</sup>

§ 39. The general rule that the purchaser of over-due paper can stand in no better position than his transferrer, does not apply so far as to invalidate bills and notes drawn, indorsed, or accepted for accommodation, over-due at the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public by their signatures to be bound to every person who shall take the same for value the same as if it were paid to themselves.<sup>2</sup> And the fact that the purchaser knew that the paper was so drawn, indorsed or accepted for accommodation, does not weaken his position.<sup>3</sup> This principle is well established in England,<sup>4</sup> and it is to be regretted that the decisions in the United States do not uniformly follow the English rule.<sup>5</sup> In England, a plea that it was agreed by the parties that the paper should not be negotiated over-due has been held bad, knowledge of the purchaser not being alleged.<sup>6</sup> If the accommodation bill or note had been paid at maturity the position of the purchaser would be altered, for a defense

<sup>1</sup>See 1 Rob. Prac. (New Ed.), 252; *Annon vs. Houck*, 4 Gill., 332; *Hughes vs. Large*, 2 Barr, 103; *Epler vs. Fank*, 8 Barr, 468; *Clay vs. Cottrell*, 6 Harris, 413; *Britton vs. Bishop*, 11 Vt., 70; *Barlow vs. Scott*, 12 Iowa, 63; *Bates vs. Kemp*, 12 Iowa, 99; *Way vs. Lamb*, 15 Iowa, 79; *Arnot vs. Woodburn*, 35 Mo., 99; *Gullett vs. Hoy*, 15 Mo., 399; *Byles on Bills*, (Sharswood's Ed.,) 286.

<sup>2</sup>*Charles vs. Marsden*, 1 Taunt., 224; *Sturtevant vs. Ford*, 4 M. & G., 101; (43 E. C. L. R.); *Carruthers vs. West*, 11 Q. B., 143, (63 E. C. L. R.) See *Stein vs. Yglesias*, 1 C. M. & R., 565; *Byles on Bills* (Sharswood's Ed.,) 285. The earlier authorities were otherwise: See *Tensen vs. Francis*, 1 Camp., 19; *Brown vs. Davis*, 3 T. R., 80; 7 T. R., 429; *Chitty on Bills* (13 Am. Ed.,) 247.

<sup>3</sup>*Charles vs. Marsden*, 1 Taunt., 224; *Brown vs. Mott*, 7 Johns., 361, overruled by *Chester vs. Dorr*, 41 N. T., 279. In *Redfield & Bigelow's Leading Cases*, 217, it is said: "The indorser (for accommodation) is equally bound whether the transfer is made before or after the paper falls due, or whether the purchaser knew the indorsement was made for accommodation or not. To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which, upon every principle of justice and fair dealing, he should be compelled to abide by."

<sup>4</sup>See the cases cited in preceding notes.

<sup>5</sup>As dissenting from the doctrine of the text, see *Hoffman vs. Foster*, 43 Penn., 137; *Bower vs. Hastings*, 12 Casey, 285; *Chester vs. Dorr*, 41 N. Y., 279, (overruling *Brown vs. Mott*, 7 Johns., 361.)

<sup>6</sup>*Carruthers vs. West*, 11 Q. B., 143, (63 E. C. L. R.)

is then established which goes to the merits of the case.<sup>1</sup> It is uniformly held, however, that if the transferrer acquired the bill or note before it was due, the purchaser from him is unaffected by the fact that it was over-due when he purchased it.<sup>2</sup>

#### DATE OF INDORSEMENT.

§ 40. If the indorsement of a bill or note be undated, it will be presumed (according to many cases) when the paper is in the hands of a third party, to have been made at the time of execution, or at least before maturity and dishonor.<sup>3</sup> It is difficult to see how a more definite presumption than that the indorsement was before maturity can be sustained, and this is all that is necessary to the protection of commercial paper.<sup>4</sup>

JOHN W. DANIEL.

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<sup>1</sup>*Lazarus vs. Cowie*, 3 Q. B., 459, (43 E. C. L. R.); *Parr vs. Jewell*, 16 C. B., 684, (81 E. C. L. R.)

<sup>2</sup>*Howell vs. Crane*, 12 La. An., 126; *Smith vs. Hiscock*, 14 Maine, 449; *Thompson vs. Shepherd*, 12 Met., 311; *Chitty on Bills* (13 Am. ed.,) 250; *Fairclough vs. Pavia*, 9 Exch., 690.

<sup>3</sup>*Cripps vs. Davis*, 12 M. & W., 165; *Lewis vs. Lady Parker*, 4 Ad. & E., 838; (31 E. C. L. R.,) *Parkins vs. Moon*, 7 C. & P., 408, (32 E. C. L. R.,) *Snyder vs. Oatman*, 16 Indiana, 265; *Stewart vs. Smith*, 28 Ill., 397; *Leland vs. Farnham*, 25 Vt., 553; *Hopkins vs. Kent*, 17 Md., 387; *McDowell vs. Goldsmith*, 6 *Id.*, 319; *Dickerson vs. Burke*, 25 Ga., 225; *Webster vs. Lee*, 5 Mass., 334; *Hendricks vs. Judah*, 1 Johns., 319; *Pinkerton vs. Bailey*, 8 Wend., 600; *Watson vs. Flannagan*, 14 Texas, 354; *Mason vs. Noonan*, 7 Wisc., 609; *Smith vs. Clopton*, 4 Texas, 109; *Barrick vs. Austin*, 21 Barbour, 241; *Mobley vs. Ryan*, 14 Illinois, 51; *Burnham vs. Wood*, 8 N. H., 334.

<sup>4</sup>2 *Parsons' N. & B.*, 9, 10; *Burnham vs. Wood*, 8 N. H., 334; *Parkin vs. Moon*, 7 C. & P., 408; *Lewis vs. Parker*, 4 Ad. & El., 838.

*Heiskell's Reports, Volumes 1 and 2.*

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The first and second volumes of Heiskell's Reports of the decisions of the Supreme Court of Tennessee have been sufficiently long in the hands of the profession to have had judgement passed upon them. They are the first fruits of a new corps of Judges and a new Reporter, and may well claim indulgence, if indeed they need any, for defects of form at any rate, and even of substance. It is not often that a court has been called upon, under more trying circumstances, to discharge its high functions. The dockets were crowded with cases, the arrearages of years. The cases themselves, commenced, as they were, either during the late civil war, or in the chaotic state of affairs immediately following, presented questions of novelty and difficulty. The new court began the discharge of its duties under the serious embarrassment of being, to some extent, new to each other, and therefore not familiar with the workings of each other's minds. They were still less acquainted with the individual members of the bar, and their several modes of reasoning. It has been a matter of surprise to us, in carefully examining these volumes, to find how well, under all the circumstances, the duty of the court has been discharged. As a general rule, there is no evidence in the opinions of the fact that the learned judges are new in their seats, and make their first appearance in a novel and untried role.

There is a judicial manner of deciding cases which is only acquired in perfection by experience, and which enables the practised judge to condense the statement of the case, and the rulings of the law into the narrowest compass without material omissions, and without unnecessary verbiage. It is not to be expected that a new comer upon the bench will be able to escape criticism in these respects at once. In attempting brevity, he is in danger of becoming obscure. It is better for him to err, as he is apt to do, on the other extreme. And it must be admitted that the learned judges in question, although they have assumed the judicial manner with marked success in many respects, have, not unfrequently, taken uncommon pains to be on the safe side in this regard.

Upon the whole, however, the opinions contained in these two volumes are very creditable. They show that the judges have dili-

gently and conscientiously discharged their laborious and responsible duties. The statements of fact are generally clear and sufficiently full, the reasoning logical or based upon precedent, and the conclusions satisfactory. If a judge, in delivering the opinion of the court, occasionally indulges in a little rhetorical display, not exactly germane to the dry issues of law under consideration, or sometimes inclines to the "*sic volo sic jubeo*" order of decision; if he now and then wanders into the regions of politics and political economy, or demonstrates with unanswerable logic, that two and two make four; these are exceptional occurrences. The large majority of the opinions are couched in unexceptionable language, and are marked by the calm and dignified tone which is appropriate to a tribunal whose duty it is to pass upon the conflicting rights of heated disputants, without favor or affection. And whenever questions of more than ordinary interest occur, the judges are generally equal to the occasion, and rise to the level of the great argument. It is no disparagement to them to suggest that they sometimes err, for it is human to err; and in the immense number of rulings made, it would be little short of miracle if they did not err.

We propose to review the decisions in these two volumes, and to make such suggestions as have occurred to us in the careful reading to which we have subjected the most of them. What we have to say, we offer simply as suggestions. It would be *presumption* in us not to admit that the *presumption* of law is with the court. Besides, the rulings upon which we propose to comment, were made after hearing the arguments of counsel prepared for the occasion, and upon due deliberation, under all the responsibilities of official position. Our suggestions have occurred to us in solitary reading, and must be taken with due allowance accordingly. They may have the merit of stimulating thought, and inducing the bench and bar to weigh the rulings with more care than they might otherwise be induced to do. The merit of the decisions themselves, if they are really meritorious, will thereby be rendered more conspicuous.

Let us first say, that the Reporter, too, has done his duty faithfully. In the searching analysis which we have made of the decisions, we have been surprised to find in how few cases it has occurred to us to change or add to the *substance* of the head notes. The language might often be condensed or otherwise altered, and, perhaps, for the better, but the matter would remain intact. And with the immense mass of business which is thrown, at this time, upon the Attorney

General and Reporter, the only wonder is that he has done his duty so faithfully, and accomplished his task so well. If we make any suggestions to him which deserve consideration, they will probably be such as would have occurred to him on reflection, or may have already occurred to him. One of these suggestions we think he has had in mind, although he has not always acted upon it, and that is to give the leading idea of the decision as the first head note, allowing the others to follow it in natural sequence. Another suggestion which he has sometimes acted upon in his second volume, and which would be a great improvement if kept up, is not to give all the cases cited from our own reports in a separate and distinct head, but to let them follow the head note which they are cited by the court to sustain. This was the course pursued by Mr. Meigs, the best of our Reporters, and deserves to be followed by his successors. It is a great saving of labor to know precisely the point upon which a case is cited, at a glance, without being compelled to read the opinion for this purpose. We are already under obligations to the Reporter for the table of our own cases cited by the court, and for indexing the citations from the Code, and other features of his reports, which show that he is fully equal to his duty.

The first case in the first volume decides that an account authenticated under the Code 3780, so as to be *prima facie* evidence of its correctness, and to require a denial from the defendant under oath, can not be introduced in evidence unless expressly declared on, and profert made thereof. This decision is put upon the wording of the Code, which speaks of the account "on which an action is brought," and is, perhaps, correct in principle, although the practice had previously been different, and although the general rule, both at law (*Townsend vs. Sharp*, 2 Tenn., 192) and in equity, (11 Paige, 405.) undoubtedly is that a change by statute in the character of evidence does not ordinarily change the form of pleading. We think the decision has met the approval of the profession.

Mr. Heiskell has thrown together, from pages 16 to 40, a number of cases under the attachment laws, the effect of which, when first decided, was to create a good deal of alarm among those who had attachment suits pending, and which did occasion a change in the practice previously pursued. Many of these cases were supposed to be attachment suits brought against citizens of East Tennessee who were in the Confederate armies, or who went South during the war, in which attempts were made to take advantage of the forms of the

law for unjust purposes. And it was surmised, by some persons, that the law might have been warped to meet the exigency of this class of cases, where the justice of the cause was with the unfortunate debtor. We have given these cases a thorough examination for these reasons, and we believe we can safely say that the suspicions alluded to are without any foundation. The decisions are in every instance strictly in accord with precedent, and, we believe, correct in principle, unless it may be on one point, to which we will call attention presently, where the decisions of our State courts are in conflict with the decisions of the Supreme Court of the United States. But even in this instance, the error of the court, if there be error, is in following a precedent made long before the war.

The defect of these cases is not in the conclusion arrived at in each, but in the want of system in working out the conclusion. No general plan of argument seems to have been adopted by the court, and the particular judge to whom the record was committed, seems to have been left to argue the case to suit himself. The consequence has been, that while the decision in the particular case is right, the reasoning is not always correct, nor the argument consistent with that adopted in other cases of the series. Thus, the first of the series of cases, while decided correctly, goes beyond any of the others in its requirements of a good attachment, beyond what was necessary, and beyond, we suggest, the law. And it was this case which caused a change of practice in attachment cases, and created the most alarm. Thus, also, the decisions in *Gibson vs. Carroll*, and *Ingle vs. McCurcy*, (pp. 23, 26,) upon identically the same point, are put upon different grounds. And lastly, although three of the cases are cases where the attachment proceedings were collaterally attacked, and the others cases where the proceedings were directly brought in question, by appeal or writ of error, no distinction seems to be made between these very different classes in the line of argument pursued. Let us go over the points enumerated.

The first case of the series is *Riley vs. Nichols*, p. 16. The case turns, as stated in the opinion, entirely upon the question of the validity and regularity of the proceedings under a *judicial* attachment. The learned judge gives in full sections 3521, 3522 and 3524 of the Code, and then properly adds: "From these provisions, it is clear that the attachment levied, and a publication as required by section 3522, are necessary before complainant is authorized to 'proceed as if suit was commenced by regular summons.'" He then gives the

order of publication actually made, which recites the cause alleged for suing out the attachment to be, that the defendants "are either non-residents, or so absconded that personal service can not be made." Now, it is obvious that this cause was the cause given for suing out the ancillary attachment, which was abandoned, and not the judicial attachment. The cause for the latter attachment was, that the summons had been returned by the sheriff "not to be found." The record, moreover, failed to show that publication, as ordered, had been actually made. It would have been sufficient in this case, which was a direct proceeding by writ of error, to have said that the order itself did not contain "the cause alleged for suing out" the judicial attachment, and that the record did not show any publication, and, therefore, the court had acquired no jurisdiction of the cause so as "to proceed as if suit was commenced by regular summons." But the learned judge adds: "It (the publication) fails to show that the attachment had been levied on the property of the defendants, or that any attachment had ever been issued against the property of defendants. \* \* Without these requisites the publication does not give the party that notice which is required by law." We submit, with great deference, that the law does not require that the publication should show a levy of the attachment upon the property of the defendant. It is true the publication is required to be made after the levy, and the record ought to show the fact, but the Code, section 3522, cited in the opinion, does not require that the fact should be inserted in the notice; and the requirement is too important, and too serious, in view of rights acquired under attachments where the publication followed the letter of the law, to be interpolated by judicial legislation—the worst kind of legislation according to the learned Chancellor of our Metropolitan district. We are not inclined to deny that the interpolation is a judicious amendment of the law, but it belongs to the Legislature, not the courts, to make it.

In *Ingle vs. McCurry*, p. 26, one question presented was the effect of an ancillary attachment without service of the summons in aid of which it was sued out. The judge who delivers the opinion, correctly says: "The only office of the ancillary attachment is to hold the property attached for the satisfaction of the judgment which may be rendered. It does not bring the party into court." And, for this reason, he holds that the *ancillary* attachment does not give jurisdiction, there having been no personal service on the defendant of the summons in aid of which the attachment was sued out, nor any pub-



lication on the levy of the ancillary attachment. In the preceding case of *Gibson vs. Carroll*, p. 23, after the court came to the conclusion that the summons was the original process, and the attachment ancillary, the point presented was identically the same, it not appearing that publication was made upon it. But the learned judge, who delivers the opinion in this case, prefers to put his decision upon the ground that there was no reference in the affidavit or writ to the summons, a ground fully sustained by the cases, but far more questionable on principle, as we shall see presently.

The decisions on page 20 are doubtless correct. They are all cases of direct attack of attachment proceedings by writ of error. It does not clearly appear from the language used in *Sullivan vs. Fugate*, that the omission in the affidavit for an attachment of the statement that the claim sued on "is a just claim," would be fatal, or whether the omission may be supplied by inference. The Supreme Court of the United States held in *Ludlow vs. Ramsey*, 11 Wal., 581, that the omission was not fatal, where the proceedings were attacked collaterally by bill in equity, upon the ground that they were void. "True," the court say, "it (the affidavit) does not say that the debt is a just claim; but it states the amount of the debt, and that it is in the defendant's note or bond, a copy of which is appended, showing that it was made under the defendant's seal, and contained a promise to pay the complainant or order \$300, six months after date. This is a particularity beyond the requirement of the statute, and more than compensates for the omission of the statement that it was a just claim." If the State Court were to settle the law distinctly otherwise, the Supreme Court of the United States would, of course, follow such a decision, for it would then become a rule of property.

And this leads us back to the remark we have already made, that in the series of decisions we are reviewing, no distinction in the line of argument is made between those cases in which the attachment proceedings are brought directly in question, and those where they are collaterally attacked. The court seems to take for granted that the defects which would avoid the proceedings in the one case, would be equally fatal in the other. But the distinction is one which lies in the very nature of things, and runs through all judicial proceedings. Irregularities and errors may always be looked to in direct appeals; but where the case has been finally disposed of, and acquiesced in, the uniform current of most courts, and the weight of the current of our own, (for our decisions are not all one way, as they ought to



be,) is that irregularities can no longer be allowed to affect the rights of the parties, and that the only question, upon collateral attack, is one of jurisdiction, jurisdiction of the person, or thing, or both.

It is upon this point, what is essential to jurisdiction in attachment cases, that our decisions are themselves fatally defective. There never has been an effort made to systematize the subject, and clearly define the rules which shall govern. Each case has been permitted to go off upon its own facts, and, often, without noticing the distinction suggested, until we are compelled to acknowledge the justness of the sarcasm of Mr. Justice Miller, embodied in the language used by him in the case of *Cooper vs. Reynolds*, 10 Wal., 315: "The question," he says, "of the conformity of these (attachment) proceedings to the requirements of the statutes under which they were had, has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the State Court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts."

"The only office of an ancillary attachment, as we have seen, is, to hold the property attached for the satisfaction of the judgment." The summons is the process which brings the defendant into court. If the defendant is thus brought into court, that gives jurisdiction, according to all of our cases, and, we believe we may add, of the cases of all civilized courts. There is not the least reason in law or common sense, why an ancillary attachment in such cases, should be more formal and specific than an original attachment, where there is no personal service on the defendant. On the contrary, every principle of reason and law would lead to the opposite conclusion. The affidavit and bond in attachment cases, are made part of the record by the Code, 3472, which is only a re-enactment of 1843, 29, 2. It is the duty of the clerk to keep the papers which, in our practice, constitute the record, and it never has been held or supposed, that every paper, to maintain its character, shall refer to every other, or to any other. That no special immunity from the ordinary rules was conceded to ancillary attachments, is shown by the case of *Isaacs vs. Edwards*, 7 Hum., 455. In that case, although the court had just decided in *Fisher vs. Cummings*, 7 Hum., 232, that such attachments must issue from, and be returnable to, the court in which the suit is pending, it was held that where it was sued out in a different court, and a demurrer or motion to dismiss would have been fatal, yet objection

came too late after answer to the merits. And see *Beeler vs. Hudleston*, 3 Cold., 201. Upon principle, in the absence of statutory requirement, it is clear that any defect in the form of the affidavit or attachment, which was not taken advantage of at the proper time and in the proper manner, would be waived, and could not by possibility affect the jurisdiction of the court, which was secured by the service of a summons on the defendant, and that the law would be more liberally construed in favor of such attachments than in the case of an original attachment.

Now, mark how judicial legislation has taken the place of law and common sense. The case of *Thompson vs. Carper*, 11 Hum., 542, came before the court, where the only point for decision, and actually decided, was, that at that time, an original attachment would not lie for a cause of action *ex delicto*. But the learned Judge who delivered the opinion, went on to say, that an ancillary attachment might be sued out as auxiliary to a suit *ex delicto* instituted in the ordinary way, and, in order to meet the objection that, to entitle a person to an attachment he must make oath that the defendant is indebted to him in a given amount, he uses the language so often quoted in the subsequent cases. "The difficulty and absurdity," he says, "of requiring the plaintiff, applying for an attachment under this law, in cases arising *ex delicto*, to make oath that the defendant is indebted to him in a given amount, is easily obviated. That form of oath is not necessary in such cases. All that is essentially necessary in such case is, that it should be stated in the affidavit, and alleged in the attachment, that a suit has been commenced by the plaintiff against the defendant, the nature thereof, the tribunal in which it is depending, the amount of damages laid in the action, and that the cause of action is just." He is not laying down what is absolutely essential in such cases. He is merely stating how an apparent difficulty may be avoided. He was obviating a formal objection to the extension of the remedy by ancillary attachment under the Act of 1843, not laying down peremptory rules the least departure from which would be fatal. It was a dictum for a proper purpose, and is so treated by the Supreme Court of the United States in *Ludlow vs. Ramsey*, 11 Wall., 588. This dictum was taken up in *Morris vs. Davis*, 4 Sneed, 482, and not merely misapplied but perverted to a totally different purpose. Judge McKinney's intention was to extend the benefit of the writ, while here his language is used to limit its functions, and lame its utility. And the same use continued to be made of it in the cases

of *Swan vs. Roberts*, 2 Cold., 157; *Smith vs. Foster*, 3 Cold., 145, and *Bogges vs. Gamble, Id.*, 148; although, in the meantime, the Code had, by section 3474, prescribed the same form for an ancillary as for an original attachment, as was admitted by the court in the cases in 3 Cold., 155, and 2 Cold., 162. The obvious inference, however, seems not to have occurred to the court, or to have been pressed upon their attention, that the Legislature having prescribed a form, the courts ought not judicially to legislate it away, and prescribe another. The attention of the court was, however, called to the fact in *Woodfolk vs. Whitworth*, 5 Cold., 561, and the court while conceding that the rule originated in a dictum merely, held that it had been too often recognized and affirmed to leave them at liberty to question the validity of the principle thereby established. To this there is no reply. We do not agree with Mr. Bishop, who says in one of his law books of a decision, which, in his opinion, was wrong, "that no number of repetitions of it could make it right, or make it law." If the court should decide black was white a sufficient number of times, while we should doubt whether the number of decisions, no matter how often repeated, would make the ruling right, we are not prepared to deny that it would make it law. And this, too, without necessarily applying to the learned court, in any invidious sense, the language of the great poet, and saying that it is:

"Like one  
Who having unto truth, by telling of it,  
Made such a sinner of his memory  
To credit his own lie."

For the court "may know the right and yet pursue the wrong," because a change of decision would endanger titles and the repose of society. Whether the particular ruling under consideration is of this important character, is, however, more than doubtful.

The result of this course of decision is, however, to throw our whole attachment law into confusion. We are compelled to be liberal in original attachments, where the defendant is not served with process, because the State law expressly requires it, and the court is not hampered by its own dicta most foolishly turned into law. And we are compelled to be unreasonably rigid in cases of ancillary attachments, where the defendant is usually served with process, because the court is compelled to violate the law by its own dictum stuck to so often that it is thought to be as binding as the laws of the Medes and the Persians. Can we wonder that the Supreme Court of the United States should treat our decisions on the subject with

And must we not agree with our Metropolitan  
judicial legislation is the worst possible legisla-

*Morris vs. Davis* remains to be considered.  
ent, in which the plaintiff claimed title  
a judgment rendered in an action of  
of sale of the land in controversy  
iliary to the suit. The petition  
suit, but the attachment it-  
ent suit, although served  
ne attachment. Yet the at-  
sion is the more remarkable, as the  
ers the opinion of the court, had occa-  
in, to decide the real principle upon which  
decided it correctly in *Greenlaw vs. Kernehan*,  
that principle may now be considered the settled law  
since the decision of *McGavock vs. Bell*, 3 Cold., 512,  
thus enunciated in that case: "No principle is better settled  
our law than that wherever a court of general jurisdiction pos-  
sesses jurisdiction of the subject matter of litigation, and has acquired  
jurisdiction of the parties, as to third persons interested under its  
judgments, its proceedings can not be held to be void after the final  
disposition of the cause. *And in this respect it is not material whether  
the jurisdiction be inherent or statutory*, provided the statute be of a  
general and public nature." It is obvious that the Supreme Court  
of the United States considered this as the better exposition of the  
law of this State, as it undoubtedly is, and ignored the decision of  
*Morris vs. Davis*, in the case of *Cooper vs. Reynolds*, 10 Wallace.  
On page 316 of that case, will be found a list of the decisions of the  
Supreme Court of this State and of the Supreme Court of the United  
States on this point.

Under the attachment law of 1794, a defendant was required to re-  
plevy the property by giving special bail, before he was permitted to  
plead. By the Act of 1843, the provisions of which are brought into  
the Code, the attachment might issue, although personal service of  
process could be had. Under this act the Supreme Court said in  
*Boyd vs. Buckingham*, 10 Hum., 438: "The sole object of the attach-  
ment now is, to secure the property so as to have it forthcoming to  
satisfy the judgment." This is, in effect, the language used by the  
learned judge in *Ingle vs. McMurtry*, as already cited. Accordingly,

it has been the settled doctrine of the courts of Tennessee, as expressed in the leading case of *Green vs. Shaver*, 3 Hum., 139, that: "The proceeding by attachment is not a proceeding *in rem*. True, the property is in the custody of the law, and will be held for the satisfaction of the debt, if the party indebted does not appear and replevy. *But the suit is against the debtor, and the judgment must be rendered against him before the property can be condemned to be sold.*" This language was used before the act of 1843, but it has been repeated in substance since that act, and treated as law: *Perkins' heirs vs. Norrell*, 6 Hum., 151; *Snell vs. McGavock*, 1 Sneed, 211; *Bogges vs. Gamble*, 3 Cold., 154. It has always been held, therefore, in these and other cases, that if the debtor died before judgment, the suit must be revived against his personal representative, and judgment taken before the land or other property levied on by an attachment can be sold.

It is not to be denied, moreover, that our courts have rigidly construed attachment cases, *where there was no personal service of process*, upon the ground that such proceedings were in derogation of the common law, and the right of the party to be summoned to make defense before any judgment can be rendered against him. And they have, in such cases, held that a defect in the proceedings, even in the preliminary affidavit, if apparent on the record, would be fatal not only where the proceedings were directly, but where they were collaterally attacked: *Maples vs. Tunis*, 11 Hum., 108. And by a singular blunder, as we have seen, this strictness was applied in *Morris vs. Davis*, in the case of an ancillary attachment, although the defendant had been personally served with process.

The conclusion reached by the court in *Gibson vs. Carroll*, p. 23, and *Ogg vs. Leinart*, p. 40, is, therefore, in accordance with previous decisions, and correct. But the ground upon which the decision in the first of these cases is put, is, as we have suggested, questionable, because based upon the series of cases on ancillary attachments referred to, which may be the law, but are assuredly not right; and the ground upon which the second case is made to rest is still more questionable for the same reason, and because these decisions are made to perform duty in a case where the proceedings by attachment are attacked collaterally. It would be well if the State courts could as effectually give such cases the go by, as has been done by the Supreme Court of the United States in *Cooper vs. Reynolds*.

*Cooper vs. Reynolds* was the case of an ancillary attachment, upon

which, however, the decree recited that publication had been made. Singularly enough it is the only case where anything like a systematic analysis of our attachment laws, as embodied in the Code, has been attempted. The State courts have blundered along, letting each case stand upon its own circumstances, without undertaking to lay down any broad, general principles, or to evolve any regular system for the guidance of the profession. In fact, they have allowed themselves to be hampered by the incongruous rulings in the cases of original and ancillary attachments, which set not merely all system, but all reason at defiance. Under these circumstances the Supreme Court of the United States have done the best they could to bring order out of chaos. Their decision in *Cooper vs. Reynolds* is, in our opinion, upon the facts of that record as recited in the decrees, undoubtedly correct in principle. We think, moreover, if the Code had to be construed by its own light, without the flickering light of the decisions of the State courts, the analysis they have given would commend itself to our good sense. But the error, in view of our decisions, is in going beyond the recitals of the decree, and beyond the exigency of the particular case, and holding where there had been no personal service of process, that the publication was not essential to confer jurisdiction. This is in conflict with the theory of our attachment laws, as construed by the courts of Tennessee, and in conflict with our decisions, and notably of *Ingle vs. McMurry*, and *Ogg vs. Leinart* in the volume under consideration.

We have lingered over these attachment cases so long that we must pass rather rapidly over the greater part of the first volume.

*Nuff vs. Crawford*, p. III, is an able and satisfactory opinion. *Girdner vs. Stephens*, p. 280 is able, but not satisfactory. That a person acquires a vested right to plead and rely upon the statute of limitations to an action of personal trespass, assault and battery, so as make a subsequent statute and constitutional ordinance, suspending the running of the act and giving further time, themselves unconstitutional, is somewhat startling, to say the least of it. The learned Judge, who delivers the opinions, does not notice *Hunger vs. Abbott*, 6 Wall., 532, or *The Protector*, 9 Wall., 687.

We suggest also that the ruling in *Dougherty vs. Shown*, p. 302, that a demurrer filed in the name of "the defendants" does not include a defendant not served, is more than doubtful.

In *Mynatt vs. Hubbs*, p. 323, as reported, it seems that, upon a "motion to dismiss appeal," the case will be remanded that lost depo-



sitions may be supplied under the statute. Rather a novel mode of of procedure, made still more so by the fact that, in the very next case, it seems to be held that "no certiorari will be awarded for a more perfect record, when the clerk certifies that he has made diligent search for the portion of the record in question, and it cannot be found." Why may not the lost record be supplied in the one case as well as in the other?

*Lane vs. Courtney*, p. 331 is refreshing, as being the only case in our books, where a woman—and a widow at that—fails to get an assurance from the court that she is entitled to all that anybody will ask for her, whether she asks for it herself or not. The original bill in the case was filed to enforce a vendor's lien on land sold by parol contract, and the widow of the purchaser claimed dower in her answer. The decision is that the claim could only be made by cross-bill. But the learned Judge who delivers the opinion intimates that if this had been done, the widow would not have been entitled to dower. However, let no fledgling of the bar presume upon the ruling. Although given as a head-note, it is only a dictum, and will be treated accordingly when the point comes up again. The court will go back on the learned Judge—certain.

*Fallwinkle and wife vs. Keith and wife*, p. 361, also, is adverse to the rights of woman, upon the ground, we suppose, that she was in bad company—that of her husband; and reverses a judgment, because the suit was brought in the name of the husband and wife, when, according to strict technical law, in the opinion of the court, it ought to have been brought in the name of the husband alone. We doubt whether the decision is altogether consistent with *Morgan and wife vs. Meek*, 2 Tenn., 169, which is not referred to. The earlier seems the better ruling.

*Burts vs. Evans*, p. 420, is an unsatisfactory decision, whether owing to its merits, or a defect in the report, we can not feel altogether certain. If the suit was exclusively upon the instrument made profert of, the only question was, did it contain a promise to pay the \$1,200, or was the recital of that consideration mere inducement to the obligation of the defendant to re-convey the negro to Mrs. Burts. So far as words go, there is no more promise to pay that sum, than there is a promise on the plaintiff's part (who also signed the instrument) to re-pay the \$565, upon the re-payment of which the re-conveyance to Mrs. B. was to be made. And, upon the trial, when the bill of sale was produced, it was very clear that

the writing sued on was not intended as an obligation to pay the \$1,200, for, in the bill of sale, the terms and times of payment were specified. The head-notes are as unsatisfactory as the opinion, but it would puzzle a Philadelphia lawyer to better them much.

*Brandon vs. Diggs*, p. 472, and *Crouch vs. Mullinix*, p. 478, are cases of writs of error *coram nobis*. The result reached in each is correct, but without tending to give us much light upon a subject of no little difficulty, namely, the province of such a writ, and the mode of procedure under it. In the first of these cases, the original suit was upon a note signed G. M., or T. M. Branda, (for the initials are given both ways in the report.) The writ was issued and the judgment taken against T. M. Brannon. But the writ was served upon T. M. Brandon, by whom the petition for writ of error was filed. The suit was brought in 1861, but the judgment was taken in 1865 at the re-organization of the courts after the war, and by default. The ground upon which the petitioner bases his claim for the writ is, that he and his lawyer, at the first term after the service of the writ in 1861, and again at the court in 1865, at which the judgment was taken, searched the clerk's office and could find no declaration filed. The errors of fact alleged in the petition why the judgment should have been different, are that the note was signed by one Branda, and was not executed by the petitioner or his agent, and is not his act and deed. No motion to dismiss this petition appears to have been made. Upon the filing of this petition, an order was entered on the Minutes, reciting that in the opinion of the court, it showed a state of facts authorizing the writ of error *coram nobis*, and ordering that the judgment by default be set aside, "and said cause is re-instated on the docket in the same plight and condition it was before the final judgment by default was entered, and that a writ of error *coram nobis* issue." The petitioner, thereupon, assigned, as errors of fact, all the matters of the petition, both those matters which constituted his claim for the writ, and those which made the former judgment erroneous, one of the latter being, as we have seen, "that the note sued on was not made by the petitioner." To these assignments of error a demurrer was filed, which, of course, admitted the truth of the errors, and yet the demurrer was sustained by the court below, and the judgment affirmed by the Supreme Court, the latter court saying: "We affirm the judgment by default, and also the judgment allowing the demurrer to the assignment of errors." It is not easy to see how this conclusion was



reached upon the record in the shape it was, unless the demurrer went back to the first defect, which was undoubtedly in the petition. The decision of the court is put upon the ground that there was negligence in not pleading the errors assigned, namely, *misnomer* and *non est factum*, to the original action, and that a proper case for a reversal of the judgment on a writ of error *coram nobis* (more accurately for obtaining the writ) was not made, and, therefore, as we understand it, that the petition was defective. But the difficulty is to see how the defect, which was in that part of the petition which set forth the grounds upon which the petitioner claimed a right to the writ, could be reached, upon a demurrer to the errors assigned, without any motion to dismiss the petition, or objection to awarding the writ, or to the writ when awarded.

The order of the Circuit Judge, beyond awarding the writ of error, was clearly wrong, for, in theory, at least, the writ is a new suit, the judgment upon which, if in favor of the plaintiff in error, is that the former judgment be not reversed, but revoked.

The Supreme Court say in this case: "The cause is here by writ of error, and, therefore, the whole record is before us for review." Does that mean the record of the original suit, as well as the new suit? And how does that accord with the ruling in *Patterson vs. Arnold*, 4 Cold., 364? Or with the theory of a new suit?

In the case of *Crouch vs. Mullinix*, p. 478, there was a motion to dismiss the petition, which was sustained by the court below, but properly overruled by the Supreme Court. The learned Judge, who delivers the opinion, correctly holds that one of the grounds stated in the petition, why the petitioner should be entitled to the writ, namely, that the petitioner had no notice of the taking of the judgment, or the purpose to take it, was sufficient to sustain the application, but adds that this ground or allegation was "a fact to be enquired of by the jury." That is to say, the ground or reason why a party is allowed the writ, is one of the errors of fact to be assigned and determined upon the issues made up after the writ is awarded. This is in accord, it will be noticed, with the practice in the preceding case, but difficult to reconcile with the theory of the writ as settled by the books.

At common law, which knew nothing of taking judgment by motion without notice, the writ of error *coram nobis* was of very limited application. It is defined to be an original writ, issuing out of Chancery, and is in the nature of a commission to the judges in the

same court in which the judgment complained of was rendered, by which they were authorized to examine the record upon which judgment was given; and upon such examination to affirm or reverse the same according to law: Tidd's Pr., 1134. Although the writ was *debilo justitiae*, it might always be resisted by showing that the party suing it out ought not to have the benefits of it, as, for example, that the party had agreed not to bring a writ of error: *Id.* The error must be one of fact which was not before the court when the judgment was rendered, and must be such that the court would not have rendered the judgment had it been known: 1 Sw., 341. The usual errors mentioned in the books are, that the defendant in the original suit, being under age, appeared by attorney; that a *feme* plaintiff or defendant was under coverture at the time of commencing the action; or that the plaintiff or defendant died before verdict or interlocutory judgment. And the better opinion seems to be that the effect of a revocation for such errors in fact only avoided the proceedings complained of, leaving prior proceedings in full force, and the plaintiff might continue the action without being obliged to commence *de novo*. *Dewitt vs. Post*, 11 J., 460; *Arnold vs. Sanford*, 15 J., 534.

The errors must not appear on the face of the record, for the remedy in that case was in a revising court; the plaintiff could not assign several errors in fact: Com. Dig. Pleader, 3 B., 15; nor any matter contrary to the record, nor a thing whereof he might have had advantage by plea: *Id.*, 3 B., 16; Bouv. Inst., § 3349.

In this State, it was at an early day decided that the benefits of this writ might be extended to cases where judgment was taken against a party without notice, so that he had no opportunity to make defense. This was a misapplication of the writ, and led to many anomalies. At common law, the writ was *debilo justitiae*; in this State, the application had to be sustained by good cause shown. At common law only one error of fact could be assigned; in this State, the same defenses might be made as to the original action. At common law, nothing could be alleged for error which the party might have had the advantage of by plea, whereas, in this State, the very object of the writ was to give opportunity for precisely such defenses. At common law, the judgment only revoked the former proceedings to the extent of the error. In this State, the case is, in effect, retried, and the judgment is, of course, final.

The truth is, the common law writ most applicable to the class of cases in question, was the writ of *audita querela*. "This writ lies

where the matter of defense arose before judgment, and the defendant had no opportunity to plead it for want of notice, or having notice, was deprived of the opportunity by the fraud or collusion of the other party. In these, and the like cases, where the defendant is entitled to a discharge, and if he could have pleaded such matter either at the beginning of the suit or *puis darrein* continuance, the judgment would have been rendered on the other side, an *audita querela* lies to give him that relief to which in equity the complaining party is entitled:" Bouv. Inst., § 3317; *Johnson vs. Harvey*, 4 Mass., 485; *Smock vs. Dade*, 5 Rand., 639; *Wendell vs. Eden*, 2 John. Cases, 258.

But our courts preferred to hold that the writ of *audita querela* was obsolete, and to transfer some of its functions to the writ of *certiorari*, some to the Chancery Court, and some to the writ of error *coram nobis*. And the practice in the latter class of cases was, if execution had issued to supersede it by petition, and, at the next term, in open court, after notice, to move for the writ of error. If not resisted, it was granted, of course. If resisted, the court determined whether the party was entitled to it; and, if allowed, such party assigned as errors the defenses which he could have made by plea, had he been notified in the first instance: *Wynn vs. Governor*, 1 Y., 150; *Goodwin vs. Saunders*, 9 Y., 91; *Merritt vs. Parks*, 6 H., 332; *Bigelow vs. Miss. Cen. & Tenn. R. R. Co.*, 2 Head., 625.

The Code changed this practice so far as to authorize the party to apply for the writ to the judge of the court in which the judgment was rendered, at chambers, at the same time that he sought the *supersedeas*. But, if the writ be granted, the opposite party would be entitled, at the next term after notice of the grant of the writ, to move to dismiss it, precisely as he would have been entitled to resist the application in open court, and to quash the *supersedeas* which might have been obtained. The court must determine whether sufficient cause is shown for the writ, as it does whether sufficient cause is stated in a petition for a *certiorari* to bring up a case from a lower to a higher court. This is a preliminary question usually raised by motion to dismiss, and is acted upon by the court before the plaintiff is permitted to assign errors. This is the conclusion of Judge Caruthers in his *History of a Law Suit*, § 544; of Mr. Hicks in his *Manual of Chancery Practice*, § 333; and is suggested by the court in *Crawford vs. Williams*, 1 Sw., 343. It is also sustained by the course pursued before the Code, in *Bigelow vs. Miss. Cent. &*

*Tenn. R. R. Co.*, 2 Head., 625, where it is said that "the Circuit Court sustained a demurrer to the petition or *rejected the application*," and the judgment was affirmed. The errors of law to be assigned and tried by court or jury, as the case may be, are the defenses which the party has to the original suit, and the verdict and judgment are, in such cases, as conclusive as they would have been had the issues been made up and tried before the judgment sought to be revoked.

The Revisers of the Code intended to embody the law as it then stood in the provisions under the head of writ of error *coram nobis*, with the single exception that the application might be made at chambers as well as in open court. The original draft of section 3116 of the Code, now before us, was in these words:

"The relief embraced in this article is confined to errors of fact, occurring in proceedings, which the person seeking relief has had no *previous opportunity of correcting*, or which he was prevented by disability from showing or correcting, or which he was prevented from *showing* by surprise, accident, mistake, or fraud, without fault on his part."

It will be noticed that "errors of fact" are the subject of the section thus worded, and control all the following clauses. But either in the legislative committee or in the Legislature, the section became transmogrified as it now stands in the Code, thus:

"The relief embraced in this article is confined to errors of fact occurring in proceedings of which the person seeking relief has had no *notice*, or which he was prevented by disability from showing or correcting, or *in* which he was prevented from *making defese* by surprise, accident, mistake, or fraud, without fault on his part."

By this change, the first and last clauses refer to and are controlled by the word "proceedings," while the intermediate clause, to make any sense at all, goes back to the words "errors of fact." The section reads very like nonsense, and goes far to excuse the confusion of bar and bench upon the subjects of writs of error *coram nobis*.

In *Hunt vs. McClanahan*, page 503, is a full and satisfactory discussion of the lawyer's lien on the property recovered or protected by his services, and the mode of enforcing the lien.

The the third head note to *Meek vs. Mathis*, page 534, is, "Appellee can not assign errors." In *Susong vs. Williams*, p. 625, the fifth head note is, "Appeal has no effect as to party not appealing."

This seems clear enough. But in *Hudson vs. King*, 2 Heis., 561, upon a bill filed by an executor against the heirs and devisees to enforce the specific execution of the sales of the property of the estate bought by the defendants, and a decree for specific performance, it was held that an appeal by two alone of several defendants opened the whole case, and relief was granted to those who did not appeal. In *Frazier vs. Tubb*, 2 Heisk., 662, where the bill was by a vendee against two executors, his vendors, for the recovery of the purchase money for part of the land sold but not conveyed, and to which the executors had no title, and decree against one executor alone, who appeals from so much of the decree as releases his co-executor, the decree was reversed to that extent in favor of the complainant, who did not appeal. And, lastly, in *Wood vs. Cooper*, 2 Heisk., 441, 455, where the bill was filed against the defendant as agent for the complainant for an account, and a decree was rendered settling the rights of the parties, and denying to the defendant the right to recover any compensation for his services, from which decree, according to the Reporter, on page 442, the complainant "prosecuted a writ of error;" but according to the learned Judge who delivers the opinion, page 455, "prayed a broad appeal;" it was held that the entire cause was brought up, and the decree was reversed in favor of the appellee to the extent of compensation for his services. And see, also, *Brevard vs. Summar*, 2 Heisk., 97. We await further developments.

In *Meek vs. Mathis*, p. 534, *Abbott vs. Fagg*, p. 742, and *Harrison vs. Farnsworth*, p. 751, it is held, in substance, that an appeal in error in a Chancery case is not demandable as a matter of right until there is a final judgment or decree upon the account, sale, or partition ordered. Upon this subject it may be well for the court to consult the rulings of the Supreme Court of the United States where the same doctrine was laid down, until it was found to work such intolerable mischief, that it has now been settled that a decree may be final so as to entitle a party to his appeal as matter of right, "although it may be necessary for a further decree to adjust the account between the parties:" *Thompson vs. Dean*, 7 Wall., 342; *Railroad Co. vs. Bradley*, *Id.*, 575; *Forgay vs. Conrad*, 6 How., 204.

In *McMillan vs. McClung*, p. 655, we have a very able and satisfactory opinion from the Chief Justice upon a question which has agitated the bar of the State since the case of *Satterfield vs. Mays*,

11 Hum., 58. The learned Judge very correctly says, p. 661: "The distinction between the cases of *Satterfield vs. Mays* and *Bridgewater vs. Gordon*, 2 Sn., 5, is by no means clear and palpable; but as we understand the principles on which they respectively rest, they are not in conflict." This is undoubtedly true, and the real difficulty is not in the principle of the decision of *Satterfield vs. Mays*, but in the application of the principle to the particular devise under consideration. It may not be uninteresting to see how the mistake originated, and how much litigation has been occasioned by the unwillingness of the court to correct it at once, as soon as pointed out. The devise in question was in these words: "I lend to my daughter, Betty Mayes, one negro girl, named Lettice, during her natural life; and after her death, she and her increase to be equally divided between her daughters." At the date of the will, Mrs. Mayes was a *feme covert*, and, no doubt, although the fact can only be gathered by implication, with five children, all daughters, then living. If she had had sons, as well as daughters, the bequest would, no doubt, have been for life, and after her death to her children, and the decision of the court is, if correct, applicable to such a bequest, as well as the exact bequest in question. The court say: "The rule is well settled that, when a bequest is made to a class of persons, subject to fluctuations by increase or diminution of its numbers in consequence of future births and deaths; and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time fall within the description of persons constituting such class. As if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects, surviving at the period of distribution, without regard to previous deaths. Members of the class antecedently dying are not actual objects of the gift." Citing, Jarman on Wills, vol. 1, 295, 296, and 1 Rep. Leg., 71, and authorities referred to.

When we turn to Jarman on Wills, at the place cited, we find that he is treating of the doctrine of lapse of legacies, and, after showing that in the case of a bequest to several as joint tenants no lapse can occur unless all die, because joint tenants take *per my et tout*, while if the legatees had been tenants in common the failure of



the gift as to one or more, by lapse, would not entitle the survivor to the whole, he adds: "Where, however, the devise or bequest embraces a fluctuating class of persons, who, *by the rules of construction*, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons *during the testator's life* will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother, or sister, or any larger number of these objects, *surviving the testator*, without regard to previous deaths." The author is not treating of the vesting of legacies, which, as a general rule, takes place at the death of the testator, and such vesting is always favored in law; but of the lapse of legacies by the death of legatees in the life-time of the testator,—a question entirely foreign to that before the court.

So, when we turn to 1 Rop. Leg., 71, we find he is treating of instances where a testator, by using the words "children" and "issue" indiscriminately, shows his intention to use the former term, in the sense of "issue," so as to entitle grandchildren to take under it, and where, on the other hand, the terms of the bequest were such as to exclude grandchildren. The subject under consideration is, therefore, the description of legatees, not the vesting of legacies.

The learned judge also refers to 7 Yer., 606. But in that case the clause of the will in dispute was held to provide expressly for the contingency of any child dying before coming of age or marrying, by giving the property to the surviving children. And the argument of counsel and the opinion of the court concede that, but for this express provision, the children took a vested interest in the property devised and bequeathed, and, upon the death of any one of them without issue surviving, his or her share would go, not under the will, but under the statutes of descents and distributions.

The only question really involved in the construction of the will in the Satterfield case was, whether the daughters took a vested interest at the death of the testator, and this, whether the devise would open to let in after-born children or not; for, if they did, it is clear that there was nothing in the will to divest that interest. The rule is settled by the Supreme Court of Tennessee, and of all other courts, that an interest *once vested* is never *divested*, except by some positive

provision of the will, and the *actual happening of the contingency of that provision*: *Alston vs. Davis*, 2 Head., 266, and English cases cited on page 269; *Petty vs. Meore*, 5 Sn., 127; *Hays vs. Collier*, 2 Sn., 585.

That a devise to A. for life, and after her death to her children, creates a vested remainder in the children of the devisee for life living at the death of the testator, subject to open and let in after-born children pending the life estate; or, if there are no children of A. living at the testator's death, creates an executory devise in favor of such children, which vests as they come into existence, is one of those elementary propositions that it is marvelous should be forgotten even for a moment: 1 Jar. Wills, 726; 2 *Id.*, 76. Such language is the least equivocal of all possible language, and admits of no argument and no doubt. And under 1784, 22, 6, (Cole 2010,) the children would take as tenants in common. A will, according to the obvious intention of every man, where the contrary is not clearly expressed, speaks as of his death, and acts upon the title of the property devised at once, the *possession and enjoyment* passing directly to the first takers, and ultimately to those in remainder.

The whole subject was ably re-argued in the case of *Brdgewater vs. Gordon*, 2 Sn., 5., in which the conclusions of the court are unexceptionable: "It seems to us that the principles (of the decisions in *Satterfield vs. Mays*, 11 H., 58, and *Womack vs. Smith*, 11 H., 478,) only apply in the case of an aggregate fund given to a class of persons as an *unit*, who take a *joint* interest in the fund. But where an estate is given to A. for life, with a *several* and *vested* interest in remainder in her children, each of the children has a transmissible interest; and upon his death during the continuance of the life estate, such interest will go to his heir or representative, according as the estate is real or personal: *unless, indeed, there be words of survivorship which shows the intention to be that the children living at the death of the tenant for life, shall take the entire estate.*"

The principles thus enunciated were recognized in *Harris vs. Alderson*, 4 Sn., 250, nor are we aware of any decision to the contrary. And see 9 Leigh, 79, and *Poor vs. Considine*, 6 Wall., 458, 475.

It is clear, therefore, that the principles recognized by our courts upon the subject under consideration are correct, and the only difficulty grows out of a misapplication of a correct principle in the *Satterfield* case. The remedy would be simply to say so, but that would be to acknowledge an error, which no one likes to do even if the



consequence be, as we have seen in the case of ancillary attachments, hopeless confusion, and, as in this class of cases, endless litigation.

If the case of *Rucker vs. Rucker*, p. 726, is a case where the proceedings attacked were brought up directly for revision, then the decision is clearly right. If, on the other hand, the proceedings were attacked collaterally, the decision is most clearly wrong; not, perhaps, in the main conclusion, but in the train of reasoning pursued, every irregularity being treated as fatal. In this last view, that is of a collateral attack, the only question before the court was, did the County Court have jurisdiction? If it had, the irregularities, no matter how great, would not affect the title of a third person purchaser under it, as we have already seen. The opinion, moreover, confounds judgments by motion on notes taken in a cause, with judgments by motion as a separate proceeding, and requires the former to have all the particularity of the latter.

If we consider the remarks, in the first case in 2 Heisk., on the subject of pleading, as those of the court, we have a rich commentary upon them in the ruling upon the plea in *McLean vs. Houston*, 2 Heisk., 37. It is hardly fair to throw the blame of such rulings upon the Code.

And this reminds us of another point of pleading, in *Caldwell vs. Richmond*, 1 Heisk., 468. The plea offered in that case was simply a new plea of old matter, not of new matter which had happened since the last continuance. Yet the court pronounce it a plea *puis darrein* continuance beyond all question, and the cause was reversed because the plea was admitted without being sworn to. Perhaps this was the fault of the Code, also?

The good old rule of shifting our delinquencies from ourselves on to a scapegoat, has by no means died out. It is still resorted to all over the world, in all vocations, our own learned profession being by no means the least prominent in adhering to it. The Code has been made to bear a full share of the shortcomings of others, as well as its own, and especially in the matter of pleading. It is notorious to every lawyer older than the Code, that special pleading, as a science, had been dying away for years, and had, at the adoption of that compilation, practically ceased to exist. There were not, at the time, ten lawyers of the rising generation in the whole State who had mastered it, and with them it was a useless weapon for want of foemen worthy of their steel. With a bench and bar thoroughly educated in it by years of careful study, it answered the purposes intended reasonably

well, although in England, its mother country, it had been greatly changed by the famous Hillary rules. Those who had studied it knew very well it was not the perfect science it was supposed to be by the ignorant, but full of anomalies, and bristling with sharp points, dangerous to the unwary, and capable of being perverted by the skillful to purposes of injustice. With a bar and a bench constituted as ours were, the science was worthless for the ends had in view. Even the inducement to master its details for the advantages to be gained thereby was virtually done away with by the liberal legislation, and liberal practice of the courts in allowing amendments. The result was, that special pleading had practically ceased to be used in its common law forms in this State. By common consent, pleadings in short as they were called, for example, "non assumpsit," "nil debet," "payment," &c., were adopted by the profession, and the courts were compelled, after vainly attempting to resist the tide, to acquiesce: *Corn vs. Brazelton*, 2 Sneed, 273. For our own part, we never could see any objection to this practice, if recognized by the parties by going to trial on such pleadings. They were as intelligible to the court and counsel (and far more so to the jury) as if written out with all the circumlocution of red tape, and all the verbiage which had ceased to be of any value when no longer charged for by the hundred words. It always struck us that to reverse a case because the pleadings were in short, or because there was no formal issue joined, or because the verdict of the jury as entered by the clerk was not fully responsive to the issues, when no exception was taken by the parties interested at the time, was the veriest anachronism. It was an exhibition by the courts, on a small scale, of that clinging to the useless and even absurd relics of the past, contrary to the fundamental maxim of *cessante ratione cessat et ipsa lex*, which kept alive the trial by single combat as part of the common law of England until within the memory of the present generation, and with us still clogs the administration of the criminal laws by making objections of form fatal, although the Code has, by the broadest legislation, expressly provided for the contrary.<sup>1</sup>

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<sup>1</sup>Under the cruel criminal laws of England, the common humanity of our nature induced the judges and juries to require the utmost strictness even in the forms of criminal proceedings. In this State, although the severity of the criminal code had long since been done away with, the courts persistently adhered to the old rulings. The pettiest departure from the usual forms was sufficient, although not objected to in the court below, to procure a new trial. The consequence was, under our system of rotation in office, with new clerks elected to office every year or two, by reason of their

The object of the Revisers of the Code, in the provisions relating to pleadings at law, was, to supply, if possible, a practical system in place of one rapidly becoming if not then actually obsolete. They undertook to sweep away useless forms, and to retain the substance of pleading in the shape in which the practice of the profession seemed to indicate that it would be acceptable. The forms were reduced to the smallest compass consistent with perspicuity, without affecting the substance. Parties were permitted to plead in due order, in strict accordance with the common law, omitting useless verbiage only, until issue was joined *secundum artem*; or, to rely upon the general

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popularity, and not qualifications for the discharge of their duties, and new district attorneys usually young lawyers, three-fourths of the convicted criminals obtained new trials for defects of form, and either escaped altogether, or were only punished at an enormous cost to the honest tax payers. Under these circumstances, the Code by section 5242, expressly provided that after a prisoner had been tried on the merits and convicted, he should not be entitled to a new trial, or arrest of judgment, or to a reversal of the judgment, "*for any of the following causes,*" enumerating nine of the defects of form which most usually occurred in practice, and were most frequently taken advantage of. But the court, when it came to construe this section, as it did in *State vs. Davidson*, 2 Cold., 184, chose to interpolate a word, and held that it must be construed as though it read "*for any one of the following causes.*" Another provision of the Code intended to avoid a practical evil which had been experienced in the administration of the criminal law for offenses committed near the boundary line of adjoining counties, met even a worse fate. The provision referred to is embodied in section 4976: "When an offense is committed on the boundary line of two or more counties, or within a quarter of a mile thereof, the jurisdiction is in either county." In *Armstrong vs. State*, 1 Cold., 338, this was held to be in violation of the Constitution of 1834, Art. I, Sec. 9, which provides that the accused shall have a right to a speedy public trial "by an impartial jury of the county *or district* in which the crime shall have been committed." This result was reached by boldly striking out the word "*district,*" because it was, say the court, "carried into the present constitution by copying from the old," and "has nothing to operate upon." These decisions do not go very far to convince us of the injustice of the dictum of our Metropolitan Chancellor in regard to judicial legislation. The last is, in fact, judicial constitutionising, if we may coin a word for the nonce.

Since writing the foregoing, we are notified through the public newspapers—no very accurate source of information we must concede—that the Supreme Court of the State has again been judicially legislating, by annulling an important act of the law-making power. One of the greatest evils of the administration of the criminal laws lies in the restrictions thrown around the qualifications of jurors by the decisions of the courts, by which intelligence has been virtually excluded from the jury box, and the time consumed in obtaining a jury, and the consequent expense to the State and country enormously increased. To remedy the evil, the Legislature by the Act of 1871, ch. 57, provided that no citizen, otherwise qualified, shall be adjudged incompetent to act as a juror in a criminal case by reason of having formed or expressed an opinion touching the guilt or innocence of the accused, upon information derived exclusively from

issue, and a statement of the grounds of defense, each ground to be stated separately with the precision of a plea. Provision was carefully made by which the parties, or the court itself *mero motu*, could ensure all the requisites of substance, singleness, and perspicuity. Afterwards, the Legislature, by the act of 1860, ch. 33, in deference to the wishes of those who still entertained, or fancied they did, a lingering fondness for the usages of the past, allowed parties the option to plead either under the Code or under the laws existing at the adoption of the Code. Learned counsel have their choice, therefore, to plead "payment" in short, if not objected to, or "that he paid the debt before action brought" under the Code; or, if he prefers it, to say: "The defendant, by A. B., his attorney, comes and defends the wrong and injury in the said several counts in the said declaration mentioned, and for plea to the allegations therein made says *actio non*, because he says," &c., according to the most approved amplitude of Chitty's forms. But there is nothing in the Code or in the law which permits him to jumble together several distinct grounds of defense, or to encumber his plea with allegations not germane to it, or to string out "words without knowledge;" and if he does encumber the record in these or other ways, it is the fault of the opposite party or the court, or both, that the plea is not stricken out. The law is as plain and perspicuous as language can make it. It is clear, however, that the duty of supervising the pleadings devolves upon the court below, or the parties while in that court. If the litigants go to trial upon pleadings defective in form, they must abide the result. The appellate court can not interfere without running the risk of doing injustice in substance, for the sake of forms which the parties have themselves treated as of no consequence. And so the Supreme

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any published account of the facts of the offense, "unless the writer of said statement in said article professed to have been a witness to the same at the time of their occurrence, which must affirmatively appear; and, provided, that said juror will state, upon the law and testimony on trial he believes he can give the accused a fair and impartial verdict." The Supreme Court has, so it is reported, declared this law unconstitutional.

Undoubtedly, the conclusions in these, and other cases of like character, have been reached by the learned judges by a train of judicial reasoning which was convincing to their minds; and, therefore, the court could not conscientiously decide otherwise. The judges were, and are, upright men, without the least motive to do wrong, acting under the solemn sanction of an oath and of official responsibility. Such considerations weigh heavily with the intelligent lawyer in critically reviewing these decisions, and make him hesitate to express a doubt of their correctness. Truth compels us to say, however, that neither the conclusions themselves, nor the reasoning on which they are made to rest, have been satisfactory to the profession in this State.

Court has held, but, strangely enough, with great reluctance: *Grant vs. Jennings*, 1 Cold., 53; *Shirley vs. Keathy*, 4 Cold., 29, 33; and see *Cornelius vs. Merritt*, 2 Head., 99, where the ruling is broader. We ourselves have a leaning, however unprofessional it may be, to the popular notion that no litigant in a civil cause should be turned out of court without a hearing on the merits, and no guilty party in a criminal case discharged unpunished.

In *Brevard vs. Summars*, p. 97, *Baker vs. M. & A. of McMinntille*, p. 117, and *Mullins vs. Aiken*, p. 535, the court has laid down some salutary rules as to what constitutes a record, and what papers can be looked to for any purpose as part of the record of a cause, although found among the papers, or copied into the transcript. The Bar have heretofore acted upon the very loose idea that it was the duty of the Clerk to know what papers were filed and used on the hearing; and that, being a sworn officer, his action in copying a paper into the transcript was *prima facie* evidence that it was a part of the record.

In the first of the cases named above, there is also a very important ruling as to the effect of an order of consolidation of several causes. Such an order is unknown to the English chancery practice, but of frequent occurrence with us, under the impression that it saves labor and helps loose practice in one case by a better practice in some other case consolidated with it. The ruling of the Supreme Court is, in effect, that an order of consolidation does not change the rules of pleading and practice in the several cases, nor alter the rights of the parties, which must still turn upon the pleadings, proof and proceedings in their respective cases.

The statement of facts in *Carter vs. Lewis*, p. 166, is defective in not distinctly showing whether the contest between Beard and Lewis was as to the priority of lien on the sixty-five acres of land sold by Lewis to Odom, or on the residue of the tract sold originally by Beard to Lewis, or upon the whole tract. In the first of these views, we should be inclined to think the Chancellor was right, and the Supreme Court wrong. And even upon the second view, the case is not easily reconciled with the principles settled in *Denny vs. Steakly*, p. 156. It seems, from the Reporter's second head note to this case, that the sale of the land made under the decree of the Chancellor was held to be void, because the decree, which ordered the sale to be without redemption, did not show that the sale on credit was allowed on the application of the creditor. The learned Judge, who delivers the opinion of the Supreme Court, simply says on this important

point: "The sale without equity of redemption is not authorized, as appears from the decree itself, and is void." If this means that the *decree of sale*, not being in accordance with the provisions of the Code authorizing land to be sold free from redemption, will be set aside upon its being brought up directly, by appeal or writ of error, for revision, nothing can be said against it. If, on the other hand, it means that a *sale* actually made under a decree of a court having jurisdiction of the persons and the property, is void for the irregularity suggested by the Reporter in his head note, then the point deserves more serious consideration than is contained in the brief phrase devoted to it by the court. It does not appear by what parties the appeal was taken, nor how the validity of the *sale* was brought in question. The validity of the *decree* is another matter, when brought up directly for revision. The impression heretofore has been that the *sale* would in such case, be good, but the land would be subject to redemption, notwithstanding the wording of the decree.

In *Grimes vs. Orrand*, p. 298, it is held, contrary to the common law authorities, but properly enough we think, that a deed to "the heirs" of a person living vests the title in the children of such person then *in esse*, to the exclusion of after-born children. Upon another point the case is not so satisfactory. It seems that there was only one child actually in existence, within the meaning of the word "heirs" as thus defined, but another was born within three weeks of the execution of the deed, who lived a few minutes and then died. Afterwards, several other children were born to the same parent, and the question arose whether the child *in ventre sa mere* took equally with the child *in esse*, and, if so, whether upon its subsequent death the inheritance vested in the only sister then *in esse* absolutely, or opened to let in after-born children. Upon this the court say: "We need not decide upon the question whether the unborn child took under the deed, as the result would be the same. Jemima, (the child *in esse*) the sister, being the heir of such child, would in either case now be entitled to the whole estate, as no other child of Britton (the father) is shown to have been born within the period *allowed by law* for taking the estate by descent." What law is meant is left to conjecture. If, as we suppose, from the date of the occurrences, the law referred to is the act of 1841-2, ch. 171, sec. 2, then the decision is directly in the teeth of the case of *Baker vs. Heiskell*, 1 Cold., 643, where the contrary construction was put upon the statute. Neither the counsel who argue, nor the learned Judge who delivers the opin-



ion in the case, in 2 Heisk., refer to the previous decision, and we can not feel certain whether it was simply overlooked or intended to be silently overruled. To add to the uncertainty, the Reporter does refer to the Coldwell case in a note, but without mark or comment.

*Martin vs. Turner*, p. 384, was a bill filed by the heirs of N. R. Martin, to set aside a sale of land made by the County Court upon a petition filed by two of the present complainants as administrators of the said N. R. Martin. The court held that the sale was void, and should be set aside, although the two complainants referred to, if suing alone, might have been repelled on account of the part they bore in procuring the sale. The decree made was, after settling the rights between the purchaser and heirs and paying charges, that the land itself, or the surplus proceeds, if sold to pay the purchaser, be distributed between the heirs of N. R. Martin, "excluding from said distribution the two administrators of the estate." It seems to us that this is a novel application of the doctrine of estoppel. That the administrators should be estopped as against the purchasers in setting aside the sale, seems fair enough; but after setting the sale aside *in toto*, and re-imbursing the purchasers in full, to take the shares of these heirs in the surplus and give them to the others, looks to us like taking the property of one man and giving it to another without any compensation whatever. It may be abstract justice, as it might also have been to have sent them to the penitentiary, but how about the Constitution?

The case of *Johnson vs. Johnson*, p. 521, throws the law respecting Chancery sales of personalty, as to which the practice has been uniform in this State to deliver it at the sale, into "most admired confusion."

In *Mullins vs. Aiken*, p. 535, the second head-note is given thus: "Under a general allegation in a bill that the vendor had no valid title, the vendee may show any defect in the title, sufficient to enjoin the purchase money or rescind the sale." This point is not directly raised by the case, and the remark which sustains it is obiter. Notwithstanding the case of *Boyer vs. Porter*, 1 Ten., 258, it may be doubted whether a bill containing only such a general averment would be able to stand a demurrer. Perhaps, if the defendant should elect to answer, he might be required to show title, but in principle even that is doubtful.

The conclusion reached in *Revis vs. Wallace*, p. 658, seems to be correct, but the reasoning is difficult to analyze, and on this account,

doubtless, the head-notes are somewhat unsatisfactory. The idea seems to be that the record offered in evidence as proof of an agreement of compromise, was not admissible because not between the same parties, and because it showed only an agreement of one party. The principle, if any, is, that the entry of an agreement on the records of the court leaves it as before—neither making it better nor worse.

The length of this article prevents us from directing special attention to the many able opinions scattered through the two volumes. The suggestions we have made sufficiently show that the decisions are, as a body, satisfactory to the Bar. The Court is justly entitled to the meed of industry, precision, earnestness, and ability.

W. F. COOPER.



### *Proposed Plan for the Improvement of the Present System of Recording.*

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As a prudential measure, and as the better policy of the law in the adoption of written instruments, only that form should be countenanced which embodies the greatest brevity, together with the clearest and most widely recognized phraseology. It is only in this way that the annoyance of doubt and the harrassing results of dispute can be avoided. We can not well afford to be redundant or obscure, for all know that our language, however properly expressed, sometimes is liable to the conflicting constructions of eminent judges. We admire the simplicity and beauty of the ancient Saxon's legal system; they sought to effect their object with nice brevity and conciseness, and stripped their legal instruments of the encumbrances of superfluous sentences and equivocal expressions. They are justly entitled to the high and learned eulogy of Sir Henry Spelman, who says ("Spelman's Works," by Bishop Gibson, p. 234): "The Saxons, in their deeds, observed no set form, but used honest and perspicuous words to express the things intended with all brevity, yet not wanting the essential parts of the deed; as, the names of the donor and donee; the consideration; the certainty of the thing given; the limitation of the estate; the reservation, and the names of the witnesses."

This brevity and perspicuity has long since been lost, and the deed of the present and of past centuries is burdened with useless words and reiterations.

*As one of the fundamental means of effecting the desired reform, that portion of the deed which is redundant, inexpressive, and useless should be discarded.*

Chancellor Kent says ("Kent's Commentaries," 11th ed., p. 536) that "the essential parts of a conveyance of land in fee are very brief, and require but a few words."

Lord Coke remarks that "if a deed of feoffment be without *premises, habendum, tenendum, reddendum, clause of warranty*, etc., it is still a good deed, if it gives lands to another and to his heirs without saying more, provided it be sealed and delivered, and accompanied with livery."

The statute of 8 & 9 Vict., ch. 119, made to facilitate the conveyance of real property, gives the shortest form of conveyance, together with one of the technical and redundant forms; and declares that the short form shall be as effectual as the other. The Act of ch. 124 of the same session gives in like manner a short form of lease.

Chancellor Kent again says (vol. iv., p. 537): "I apprehend that a deed would be perfectly competent in any part of the United States, to convey the fee, if it was to be to the following effect: 'I, A. B., in consideration of one dollar to me paid by C. D., do grant (in New York State "do grant" would be sufficient, but in a few others, as Delaware, Virginia and Kentucky, where deeds operate under the Statute of Uses, as they did in New York prior to 1830, when the Revised Statutes went into operation, "do bargain and sell") to C. D. and his heirs (in New York, Virginia, etc., the words "and his heirs" may be omitted) the lot (describe it). Witness my hand and seal, etc.' But persons," the learned Chancellor continues, "usually attach so much importance to the solemnity of forms, which bespeak care and reflection, and they feel such deep solicitude in matters that concern their valuable interests, to make 'assurance doubly sure,' that generally in important cases the purchaser would rather be at the expense of exchanging a paper of such insignificance of appearance for a conveyance surrounded by the usual outworks, and securing respect and checking attacks by the formality of its manner, the prolixity of its provisions, and the usual redundancy of its language."

The English practice, and the New York practice down to the present time, have been in conformity with the opinion of Lord Coke, that "it is not advisable to depart from the formal and orderly parts of a deed, which have been well considered and settled."

It matters little, in consideration of the expediency or in expediency of this question, whether the revision of the "ancient deed" is distasteful to our prejudices or objectionable to our poetic sentiments. The simple question is, whether the proposed amendment is wise, and best calculated to work an improvement upon the present deed.

It will be admitted that, if the deed be simplified, something will be accomplished tending towards a realization of our project. Nor is this something of slight importance, if we reflect upon the vast

number of deeds annually executed and recorded. The time saved and ease acquired would surpass belief; and, as it will hereafter be seen, the useless expense and waste of labor are by no means inconsiderable.

The deed should contain the *names of the covenants only*; this would obviate the repetition *ad infinitum* of the long covenants, the legal tenor and effect of which is, and should be, as well understood as other principles of law; and therefore the repetition of the covenant, which is in reality a mere statement of the principle of law, is useless.

This end could be attained by the Legislature enacting a statute recognizing and reciting in full the covenants usually contained in deeds, such as the *right to convey*, which ordinarily reads: "And I, the said A. B., for myself, my heirs, executors and administrators, do covenant with the said C. D., his heirs and assigns, that I have good right to sell and convey the said premises to the said C. D., his heirs and assigns for ever, as aforesaid;" *covenant of seisin*, the operative words of which are: "That I am lawfully seized in fee-simple of the aforegranted premises;" *of warranty*, the most important of the usual covenants, to-wit: "And that I will, and my heirs and executors, and administrators, shall warrant and defend the same, to the said C. D., his heirs and assigns for ever, against the lawful claims and demands of all persons;" the *covenant against encumbrances*, "That said premises are free and clear from all encumbrances;" and, lastly, the covenant of further assurance, sometimes inserted in deeds, the object of which is to bind the grantor to execute a further deed or deeds, if necessary, to make the title perfect and secure in the grantee. The statute ought to declare that a deed conveying land by the *names* of these covenants should be in like manner construed, and have the same effect as if the whole body of the covenants were incorporated therein. The statutory deed would then be like the following: "Know all men, by these presents, that I, A. B., in consideration of ———, to me paid by C. D., etc., the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said C. D., the following described, etc., ———: To have and to hold the aforegranted premises, with all the privileges and appurtenances to the same belonging, to the said C. D., his heirs and assigns, to his and their use and behoof for ever. And I, the said A. B., for myself, my heirs, executors, and administrators, do covenant with the said C. D., his heirs and assigns, that I am law-

fully seized in fee-simple of the aforegranted premises, that they are free from all encumbrances, that I have good right to sell and convey the same to the said C. D., his heirs and assigns for ever, as aforesaid; and that I will, and my heirs, executors, and administrators shall warrant and defend the same to C. D., his heirs and assigns for ever, against the lawful claims and demands of all persons. In witness whereof, etc.," and usual acknowledgment.<sup>1</sup> This exemplary deed would be the *statute*, supported by the wide learning of centuries of judicial construction and elucidation; and the short deed, or the deed of the parties, would, in fine, be an individual proclamation or signification, in writing, that their deed be construed, and have the same effect, as the exemplary statute-deed, and would read about as follows: "I, John Doe, of No. — West ——— Street, of the City of New York, unmarried, do hereby convey to Richard Roe, of No. — East ——— Street, in the City of New York, the house and lot in the ——— Ward of the City of New York, known by the Ward No. —, and Street No. — West ——— Street, *with full covenants*.

(Signed)

JOHN DOE."

The same brevity could be applied to leases and mortgages.<sup>2</sup>

*Our next suggestion is, that the deeds be not literally copied into books of record, but that the originals be kept on file, and certified copies thereof, with the certificate of record,<sup>3</sup> returned to the party, and reference had to their principal parts, as before mentioned, in a book, which would be the only book of entry both for conveyances and mortgages, and all other encumbrances, and so arranged that every parcel of land have its separate folio, containing the description of the property and the name of the owner, who, on the principle of mercantile bookkeeping, would be credited with the title he possesses, and charged with the mortgages and other en-*

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<sup>1</sup>The personal or incidental covenants which are seldom inserted in deeds might be recited in full; these depend upon variable circumstances, and, being unknown, can not be anticipated.

<sup>2</sup>There is no reason why mortgages, in this State, (New York,) should *apparently* be conveyances, when in fact and in law they are not, but are intended merely to create a lien. The mortgage is a long and cumbrous instrument, which costs more to record than a deed. Why, then, not transform it into a simple lien, created by a few effective words? In this manner, the mortgage security would become more flexible, and of broader usefulness in the business world, as the lien would then be a subject of super-lien, and could be disposed of in part, if desirable, and in many ways rendered additionally beneficial as collateral security.

<sup>3</sup>This would give the public the further benefit of access to the original deed in case of doubt or discrepancy; the certified copy in the hands of the grantee would, to all intents and purposes, be equally satisfactory as the possession of the original.

*cumbrances thereon.* Alphabetical lists of the names of all parties interested in the real property of the county, as owners, lessees, mortgagees, etc., with reference to the folios containing the description of the respective parcels of land, would constitute all that is necessary to the possession of a reliable guide to the searcher, and a sure key to the condensed record for the benefit of all interested in the real estate of the county.

Reference, as before stated, should be made by number to the originals on file, of deeds, leases, mortgages, etc., and be ready of access to all desiring to examine them.

In this manner, a chain of title would be concentrated, clear, and simple to review, and speedily ascertained; in fact, it would be a perfect Register's abstract of title, always entire, as it will contain the record of every transaction, with regard to a certain piece of land, as though it were encircled in a frame. As it is, the record of these transactions is dispersed through many books, or different parts of the same books, requiring time and attention to collect and arrange.

It will also, as we have said, abolish the necessity for a numerous body of clerks, and the whole recording system will be more admirable, by reason of its compactness, completeness, perspicuity, economy, brevity, and despatch; while, at present, it is competent of demonstration that, had the market value of real property remained stationary, and not been inflated by the immense increase of population, and the influence of speculation, the absolute value of many a parcel of land in the city of New York, that has, say within five years last past, changed hands ten times, has as many times been mortgaged, and three times foreclosed, would have been totally exhausted in the expense of searching.\* Add to this the vast amount of labor thus squandered, which could have been saved and otherwise profitably employed, and we have one of the fruitful sources of high rents, increased taxation, and consequent pauperism.

As soon as the Register has compared the original deed and the copy furnished by the party applying for record, he should at once number it, and give the number, with the time of presentation, as a receipt. In the rural districts, the deeds could be compared and entered in presence of the party, and the certified copy, with a certificate of registration indorsed thereon, immediately returned. In cities where the business is extensive, it may be necessary for the

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\*The New York Code of Procedure, Sec. 308, in view of the great labor in searching on foreclosure, has granted an extra statutory allowance to the party foreclosing.

party to wait until the entry on the books can be made, and the certified copy prepared. The original deeds could periodically be bound in books, chronologically marked, and properly numbered.

As it now is, no person, after the transcript of his deed has been made, examines the record to ascertain whether it be correctly copied. It therefore depends upon the ability and accuracy of the clerk, who has to decipher unintelligible legal phrases, illegible handwritings, and, finally, in transcript, pronounce *his* construction of the document, which is the sole criterion for future arbitration.

In this connection, there is, however, another far more serious and important danger, productive of injustice and loss. Fraudulent changes in the record of papers, by parties interested having free access to the books, have been made, whereby innocent parties have lost their security. As the law is, the record is conclusive in determining the rights of litigants; and as the Register is not responsible for frauds like this, the result is, of course, that innocent parties must lose their security without any *laches* being imputed to them.

Cases like the following have also occurred: A mortgage was given to secure \$3,000, but, by mistake or *fraud* the clerk recorded it as for \$300. It was held that "it was only notice to subsequent *bona-fide* purchasers for value to the extent of the sum expressed in the record." *Vide* Beekman v. Frost, 18 Johns., 544.\*

A further chance for mistake or fraud arises in this manner: A party hands a mortgage to the Register, say, at 1:15 P. M., and another delivers to him a second mortgage at 2 P. M., and they are, by some reason or other, exchanged in point of time. This, we see, would be impossible if the Register were required to certify the time of delivery on the deed, or the number of it, held by the grantee. Cases have been known where, by connivance, the record of papers has been fraudulently made by the notary ante-dating the deed, and the clerk recording it *nunc pro tunc*, as the day of the false date.

The next step in the series of innovations in the Register's Office would be that, upon the deed being left in that office, the clerk shall enter upon the *common tickler* or *minute-book* now in use, the year, month, day, hour, and minute of its presentation, the names of the grantor and grantee, mortgagor and mortgagee, and a short reference to the property.

The deed *may* contain the common repetition of the tedious description of the premises by metes and bounds, but it should be

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\*See also 1 Johns., ch. 288.



required invariably to have reference to the ward numberas in use in the Tax and Assessor's offices, or to some other unmistakable name of the land, as that commonly attached to certain farms, to correspond with the designation of the property on the folio of the principal book (the ledger.)\*

The tickler should refer to this book in the nature of a ledger, wherein, as has just been said, the premises will have been noted by their ward numbers, or similar designations, together with the description of the property. This would render the record complete. But, in order to accomplish all the beneficial results intended, it would further be required to provide by legislative enactment:

*First*—That, upon the application of the parties in interest, the Surrogate shall send copies of every probated will of real estate to the Register's Office, to be entered under the respective names of the new owners by right of devise. Any appeal from the decision of the Surrogate should be noticed to the Register, and entered in the manner of a *lis pendens*. If the owner of any real estate die intestate, it should be made compulsory on the heirs to obtain from the Surrogate, upon due proof, a certificate of the fact, which should have the force of a judicial declaration or decision of title, stating their names and relation to deceased, and to be forwarded to the Register.

*Second*.—In a deed or mortgage of a male grantor, if a wife be not a party to the conveyance, let him state whether he be married or single; this would avoid the uncertainty as to dower-right.

*Third*.—In order to obviate the necessity of referring to the past Register's records at all, which would undoubtedly save an incalculable amount of labor and expense, the Legislature should appoint a commission, with power to examine upon applications and certify to the titles of the present owners of real estate, and enact a statute, in the nature of a statute of limitations, declaring the new record final, when made upon the certificate of such commission, and after proper publication, if not objected to within a certain time.

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\*Such correspondence would also avail towards checking mistakes, and unnecessary expense and labor to parties paying taxes and assessments. These are imposed and collected by the ward number, which is known to very few owners, as they are generally not acquainted with the location of their lands on the maps. Numerous suits have arisen from such mistakes, where parties for years were in the habit of paying taxes and assessments for their neighbor's property while their own has been sold by the collector of taxes, assessments, or water rents.



*Fourth.*—Judgments, including those of the United States courts (and all other liens, such as mechanics' liens, appointments of receivers, etc.), should be docketed in the Register's office, if such be a distinct office from that of the County Clerk, and be a *lien only on property owned by the debtor at the time of such docketing, and on lands acquired by him within ten years thereafter, upon the judgment-creditor applying, in writing, to the Register to enter against such land, on its appropriate folio, the lien of the judgment.*

This provision, above all others, is likely to meet with great opposition from the Bar. We grant that it strikes at a long-established, and, to many, an unexceptionable practice; but we maintain, nevertheless, that this very practice is productive of much confusion, and even injustice, and can be satisfactorily reformed in the manner proposed. In the case of chattels, the Sheriff makes such public designation and announcement by a seizure under the execution, and, during such seizure, no one can be misled with regard to the ownership and encumbrance on the property. The Sheriff would protest and call the law to his aid if asked to seize upon personal property, *bona fide* disposed of after the entry of judgment and issue of execution; such a course would create suspicion and diffidence in the business world, and in a great measure obstruct the currents of business and traffic. Why not adopt the same rule with reference to land? The cases are synonymous, and the reason of the provisions identical.

There is no valid reason for giving to judgments their present monopoly of lien, without any effort on the part of the holders of judgments to acquire and define the extent of such lien, so that the public may not be prejudiced by the sudden claim of some long-hidden and silent judgment. The specific entry of the judgment against a certain parcel of land would be similar to an open and tangible seizure of personal property by the Sheriff under an execution.

The theory of the law now seems to be, that, as the judgment-creditor is unable to conveniently and accurately ascertain the amount of land owned by the judgment-debtor, his lien shall not suffer on account of its not being attached directly to any one specific parcel of land. Under the system we are now discussing, this reason would vanish; and the rule should therefore obtain that, as each parcel of land of the owner is clearly and briefly entered above his name, the judgment-creditor ought to specifically charge those which he intends

to affect, otherwise he would possess an unwarrantable advantage over the purchaser of a piece of land, in compelling him to search, at his peril and expense, in behalf of the judgment-creditor; whereas, equitably considered, the judgment-creditor should take care of his own rights, and search for and attach his lien to the property of his debtor.

A like objectionable feature of the present system of judgment-liens is this: A man against whom a judgment was entered, if at the time he owned no real property, would not generally have the same cancelled of record when paid. After years had elapsed, when he acquires real estate, upon attempting to dispose of it, he will find such judgment in his way, and if he has lost the satisfaction piece, and is unable to trace the judgment-creditor, he must, to his great damage, either give security against such judgment, or rescind the contemplated transaction.

As to *lis pendens*, the searcher now is compelled sometimes to examine hundreds of them, in order finally to discover that none applied to the land under search.

*Fifth.*—As another necessary safe-guard, and for general convenience, the owner should receive notice of every change made in the title and encumbrances upon his property; and to that end, and to generally facilitate the identification of parties interested in real estate, their respective residences, by street, numbers, etc., should invariably be indorsed upon each application for record. If, for instance, a mortgage on one's property be assigned, and the assignee neglect to call for the interest when due, the mortgagor, not being informed of the residence of the assignee, nor of the assignment, how can he protect himself against the expense and annoyance of a foreclosure without incurring the certain expense and annoyance of depositing the money in court?

This would also prevent or lead to a speedy discovery of a fraudulent conveyance or encumbrance. Bogus titles and mortgages are well known in the real estate market, since personating the owner before an officer taking acknowledgments of deeds is not very difficult; and within the labyrinth of entries, especially when they refer to unimproved land, that does not change hands so frequently, they can rest hidden long enough to loom up in time to claim, with all the boldness of successful knavery, a legitimacy as against the genuine title.

The records ought to be kept in a place different from where the

deeds are preserved, so as to be an additional security in case of destruction, by fire or otherwise, of one or the other.\*

*Lastly.*—The Register should be vested with judicial powers, so as to be enabled to refuse to record papers which are not in form of law; but he should be bound to make a memorandum on the margin of the folio whereon the property is recorded, and which is intended to be affected, of the time of such presentation; so that, upon a successful appeal from the decision of the Register, the effect of the recording might revert back to the time of the first presentation; this memorandum would also be in the nature of a *lis pendens*.

It will thus be seen that the abstract of title and search to any parcel of land would consist only of a certified copy of the subsisting part of its folio upon the ledger, and could speedily be made, and at a trivial charge, making unnecessary the long and unsatisfactory searches which, as now conducted, can not be but cumbersome and expensive.

In conclusion, we desire to direct the attention of our readers to the fac-simile diagrams of the proposed books of conveyance, tickler, and index, which will be found on pages 487–8–9. These diagrams will enable the reader to comprehend at a glance the correct character and importance of our suggestions.

If they be to any extent worthy of consideration and practicable in execution, the writer feels deeply impressed that active steps should at once be taken to secure their adoption by our Legislature.†

The time has come in this State for the immediate and thorough reform of our judicial and political organisms.

The laws, first of all, need revision, abridging, and systematizing, in order to place them understandingly within the comprehension and sphere of every intelligent citizen, thereby banishing that present

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\*At the sitting of the Grand Jury of the Court of General Sessions, on the 6th day of December, 1871, they presented to the court, in due form, the unsafe and exposed condition of the Register's Office in the City of New York, and the liability of all its records being destroyed by fire, and recommended the erection of a building, entirely fire-proof, for the safety of these records. The conflagration of Chicago, and the consequent destruction of all the registration records, furnishes a timely monitor to other cities to render the buildings, wherein is deposited the evidence of the title of their landed estate, proof against destruction by fire. The citizens of Chicago are destined to be long harassed by disputes and litigation to doubtfully settle what was once entirely certain.

† Since the above has been written, Hon. Franz Sigel, Register of the City and County of New York, has read advance sheets of this article, and is now prosecuting active measures to introduce in his office the material innovations herein suggested.

belief, which is a stigma upon the legal profession, that the ignorance of the masses of the people in questions of law, and of the "ways that are dark" and the "tricks that are vain," forms the necessary outwork and is the indispensable abettor in the perpetuation of business.

We are to-day upon the arena of great political revolutions, which should not only anathematize dishonest rulers and incompetent officials, but the moral influence of honorable men should permeate our whole civil, political, and judicial systems, and make them abler and nobler protectors and expounders of the people's rights and liberties.

SAMUEL D. SEWARDS.

House and Lot in the City of New York, — Ward. Ward No. Street No. — West — Street.

GENERAL DESCRIPTION.—All that certain lot, etc.  
(D I A G R A M.)

Owner.	Grantor.	Instrument.	Recorded.	Consideration.	Lis Pendens.	Mortgages.	Judgm'ts.	Cancellation.	Mech'ics' Liens.	Sundries.
John Doe	Rich'd Roe	Full covenant deed, dated March 12, 1871, acknowledged before W. M., Commissioner of Deeds, No. — E. — St.. on file under No. 1,060 of 1871.	March 14, 1871, at 10:50 A. M., at the request of Maxwell & Caldwell, No. — Broadway.	..	..	I. To Chas. Friar, \$3,000, dated Jan. 2, 1870. Ackn'ged, etc. Recorded Jan. 2, 1870, 2 P. M. Payable Jan. 1, 1872. Int. 7 per cent., payable semi-annually. II. To Lewis Styles, \$5,000, etc. Ad. I. Assignm't B. Batty, etc. Ad. II. Paid on acct \$3,260, by, etc. Receipt and release dated—	..	..	..	..

FAC-SIMILE OF THE PROPOSED REGISTER'S INDEX.

CONVEYANCES.		MORTGAGES.		LEASES.	
A	Doe, John, Book 8, fol. 1, 93, 187, etc.	A		A	
B		B		B	
C		C		C	
D		D		D	
Etc.		Etc.		Etc.	
		R		Roe, Richard, Book 12, fol. 20, 24, 81, etc.	

The Present System of Registering.

No.	Month.	Day.	Hour.	Minute	Document.	From Whom.	To Whom.	Property.	Ledger.		Bound in Book No.	Sundries.
									No.	Fol.		
1	Jan.	24	10	5	Deed.	Butler, Chas.	Williams, Edw.	H. & L. No.40 E 40th St.	4	212	1	
2	"	"	10	6	Mortgage, \$10,000.	Gregory, Jos.	McMullen, Patk.	H. & L. No. 1010 3d Av.	5	198	1	
300	April	6	9	10	Lease, 2 Years	Williams, Edw.	McAdam, Francis.	H. & L. No.40 E. 40th St.	4	212	2	
301	"	"	9	10	Power of Atty.	Williams, Edw.	McAdam, Francis.		4	212	3	
750	July	1	10	5	Assignment of Mortgage.	Hoffman, Wm.	Kleber, Anthony.	Lot 12th Ward, Map No. 810.	1	10	3	
751	"	"	12	10	Satisfaction of Mortgage.	Jaques, Lewis,		H. & L. No. 20 West 18th St.	9	51	3	
1060	Sept.	9	11	50	Deed.	Bell, Hugh.	Kelly, John.	Gore, 11th Wd Map No.50.	10	20	4	



## SELECTED DIGEST OF STATE REPORTS.

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[For the present number of the Digest, selections have been made from the following State Reports: 53, 54 Illinois; 32 Texas; 45 Alabama; 45 New York, (6 Hand.); 40 California; 26 Arkansas; 30 Iowa; 65 North Carolina; 20 Ohio.]

ABANDONMENT.—See CONTRACT, 22.

### ABATEMENT.

1. Where an action is prematurely brought because of an agreement to extend the time of payment which has not elapsed, that is matter in abatement only—not in bar of the action: *Archibald vs. Argall*, 53 Ill., 307.

2. When the maker and indorser of a note have been sued in the same action, if the maker dies during the pendency of the suit, the suit abates as to him, and it is not necessary that his administrator be made a party defendant, although his estate remains liable for the debt: *Aldridge vs. Mardoff*, 32 Tex., 204.

ACCEPTANCE.—See CONTRACT, 12.

ACKNOWLEDGMENT.—See LIMITATIONS, 1.

### ACTION.

1. An executor may maintain an action at law against one who was his co-executor, but who has been removed before the commencement of the suit, to recover the purchase money of property bought by the latter executor at a joint sale made by them, the payment of which became due before his removal: *Hendricks vs. Thornton*, 45 Ala., 299.

2. A married woman, after the death of her husband, can not be sued at law to enforce the liability of her separate statutory estate on contracts for articles of comfort and support of the household, furnished the family during the life of the husband, suitable to the degree and condition in life of the family, and for which the husband would be responsible at common law: *Carter vs. Warm*, 45 Ala., 343.

3. The plaintiffs were first and second, and the defendant third indorsers upon two drafts, and a note of one N., who held a contract

for the purchase of lands. N. being insolvent, transferred the contract to the defendant, absolutely in form, but in fact as security for the latter's liability on N.'s account, including the draft and notes. On the same day he made a general assignment to the plaintiffs, in trust for creditors, preferring the drafts and note. Shortly after this, the plaintiffs gave to the holder of the drafts and note, for the aggregate amount thereof, a note made by one of them, indorsed by the other as first indorser, and by the defendant as second indorser. The holder, a bank, thereupon gave up to them the drafts and note, with the bank mark of cancellation upon them. One of the plaintiffs, under the suggestion of the defendant, then brought action against the acceptor of the drafts, but failed from defect of parties. The new note was renewed, from time to time, and finally paid by the defendant. About the same time, the defendant paid up the amount due upon N.'s land contract, and took a deed of the premises. Immediately after paying the note, he brought suit against the plaintiffs to recover back the moneys so paid, and after litigation (in which the plaintiffs defended, on the ground that the defendant had received N.'s contract and deed as security for the original drafts and note, and that the value of such security exceeded the amount paid by him; which defense was denied, in all particulars, by the defendant,) recovered judgment against them for the whole amount, which judgment they paid. The plaintiffs then brought this action, asking either to be permitted to redeem the contract as assignees of N., or to be subrogated as sureties to the defendants' rights in the contract, to the extent of their payments: *Held*, this action having been commenced more than ten years after the assignment, and after the giving of the new note by the plaintiffs, with defendant as indorser, but within ten years after the payment by the plaintiffs of the defendants' judgment against them, that the right to redeem was barred, but the right to subrogation not having accrued until the payment of the judgment, was not barred by the statute of limitations: *Held*, further, that the defendants' judgment was no bar to this action to enforce such right of subrogation: *Bennett vs. Cook*, 268; 45 N. Y., (6 Hand.)

4. There is no rule forbidding one partner to sue another at law in respect of a debt arising out of a partnership transaction, if the obligation or contract, though relating to the partnership business, is separate and distinct from all other matters in question between the partners, and can be determined without going into the partnership accounts: *Crater vs. Binninger*, 545, *Ibid*.

5. The defendant purchased from the plaintiff an engine, boilers and other machinery. The engine and boilers were agreed by the plaintiff to be of the best material and workmanship, and in perfect running order. No time was specified for their delivery, but they were to be approved by the defendant's engineer. The boilers, after delivery, were found defective; one of them collapsed at the first trial, and was rendered useless. The defects in the boilers were subsequently supplied by the plaintiff, with the consent of the defendant, and were then accepted by the defendant and approved by his engineer: *Held*, that the original failure of the boilers was not, after their final acceptance, any defense in an action for the price. Such acceptance, however, was no waiver of a right of action for the damages occasioned by the explosion and loss of use of machinery, and those damages might have been recouped in an action for the price by proper averments in the answer: *Cassidy vs. LeFevre*, 45 N. Y., 562; (6 Hand.)

6. An obligation was obtained from the plaintiff by fraudulent representations, A. and B. both claimed to own it by assignment. Each commenced an action against him, and claimed in hostility to each other: *Held*, that he might, during the pendency of the actions against him, bring a separate suit against both claimants, to be relieved from the contract, on the ground of fraud therein, and was entitled to the decree of the court against them ordering its surrender and cancellation, upon establishing the fraud: *McHenry vs. Hazard*, 580, *Ib.*

#### ACTION FOR DAMAGES.

1. Where an unfenced line of railroad passes through a field, in which the live stock of the owner, or occupier of the field, are running, and the stock of the occupant stray into the road and are killed by the train, these facts, unexplained, make a *prima facie* case of negligence against the railroad company: *McCoy vs. Cal. P. R. R. Co.*, 40 Cal., 532.

2. The owner of the stock is not guilty of contributory negligence, from the fact that he knew the road was not fenced, when he turned his stock in the field: *Id.*

**ACTION.**—See ABATEMENT, 1, 2; ADVERSE POSSESSION, 1; ATTACHMENT, 3, 4, 5; BILLS AND NOTES, 2, 7; CARRIER, 1, 2, 3; PARTIES, 1, 2.

**ACT OF THE LEGISLATURE.**—See EVIDENCE, 5.

ADMINISTRATION.

1. Letters of administration issued by a clerk of the Probate Court, acting under authority of the Confederate State Constitution of 1861, after the inauguration of the State Provisional Government of 1864, are void, being issued without legal authority, and are not admissible in evidence: *Page, Adm'r, vs. Cook, Adm'r*, 26 Ark., 122.

2. An administrator has no authority to sell the real property of his intestate, except in the manner prescribed by statute: *Burgauer, Adm'r, vs. Laird*, 26 Ark., 256.

3. Although the sale is invalid and void, without an order of court for that purpose, yet the purchaser having gone into possession by consent of the administrator, is not a trespasser or wrongfully in possession, and could not be subject to a suit unless he refused to surrender upon demand: *Ibid*, 256.

4. Where an administrator, on the sale of property belonging to the estate, received the notes of the purchasers with security, and it resulted that the principals and sureties were insolvent, this will show *prima facie* that the administrator had neglected his duty, and was guilty of a *devastavit*: *Curry et al. vs. The People, &c.*, 54 Ill., 263.

5. In an action upon an administrator's bond, at the instance of a creditor, a *prima facie* right of recovery exists, if it appear that the person for whose use the suit is brought holds a claim against the estate, and that the administrator has been guilty of a *devastavit*, to the extent of such claim. It is not essential to such right of recovery that the creditor shall prove there were no assets to which he could resort to the satisfaction of his claim: *Ibid*, 263.

6. It has been held that an administrator has no power to file a bill to remove a cloud from, or perfect the title to lands of which his intestate died seized: *Shoemate et al. vs. Lockbridge, Adm'r*, 53 Ill., 503.

7. An administrator has no authority to apply to a court of Chancery to reform a deed made to his intestate in his lifetime, on the allegation that there was a mistake therein in the description of the land intended to be conveyed: *Ibid*.

8. A party claiming an interest in land, sought partition thereof against the infant heirs of the party with whom he had the transaction, alleging he was entitled to a certain undivided interest, upon his performing certain conditions, with respect to which he had made a settlement with the administrator of the estate. *Held*, the infant heirs not having been parties or privies in any way to such settle-

ment, were not bound by it, and it could not be evidence against them in that suit: *Williams et al. vs. Wiggand et al.*, 53 Ill., 233.

9. Money paid to an administrator by a railroad company, upon whose road the intestate was killed, being paid as compensation therefor, is assets in the hands of the administrator, which he is bound to administer under the statute on that subject. And whether the money is recovered by suit, or voluntarily paid under the statute, as in this case, it is as much assets in the hands of the administrator as if recovered for the benefit of creditors. Being assets, the sureties on the administrator's bond are responsible for its proper distribution: *Goltra et al. vs. The People, &c.*, 53 Ill., 224.

10. Where an administrator gives notice that he will file a petition on a particular day of a term, for an order to sell real estate to pay debts, he is not restricted to the day named, but may file his petition on a subsequent day of the term: *Shoemate et al. vs. Lockbridge, Adm'r*, 53 Ill., 503.

11. The correctness and effect of a settlement by an administrator with a probate judge, can not be assailed in a collateral action, especially where there is no basis therefor laid in the pleadings: *Harlin vs. Stevenson*, 30 Iowa, 370.

12. An administrator may, for the benefit of the creditors of the estate, maintain an action to recover property, or its value, voluntarily or fraudulently conveyed by the decedent: *Cooley, Adm'r, vs. Brown*, 30 Iowa, 469.

13. Nor would the fact that such property had for a valuable consideration been transferred, or passed to a third party, affect the right of the administrator to recover, if such third party had, when he purchased it, notice of the defect in the title: *Id.*

#### ADMISSION—See ESTOPPEL, 4.

#### ADVERSE POSSESSION.

1. Where one holding adverse possession of lands, under a claim of right, died, leaving his widow and heirs in possession, and afterward the widow married and continued to reside on the premises with her second husband and said heirs, it was *Held*, that a judgment against such second husband, in an action against him for the recovery of the property, did not bind the wife and heirs, nor estop them from insisting upon the title acquired by the adverse possession of their ancestor and themselves: *Hamilton et al. vs. Wright*, 30 Iowa, 479.

2. To constitute adverse possession under our statute, it is not necessary that the party must have taken and held possession under *color of title*. It is sufficient if such possession was taken and held under a claim of title: *Id.*

3. To constitute color of title, it is not requisite that the title under which the party claims should be a valid one, and it is immaterial whether its want of validity results from its original and inherent defects, or from matters transpiring subsequently, nor whether such want of validity is attributable to individual or judicial action: *Id.*

4. A possession under claim by parol gift, which will defeat a sale of land by the real owner during such possession, must be such as amounts to an ouster of the real owner, and it must be *bona fide*, notorious and distinct from that of the real owner, else it can not prevail against the title of a *bona fide* purchaser for a valuable consideration: *Hawkins vs. Hurlson*, 45 Ala., 482.

5. A possession under pretense of a parol gift, without color of title, which will defeat a sale by the real owner to a *bona fide* purchaser for a valuable consideration, only extends to the actual possession—to the land inclosed and under cultivation—and not to the whole tract, if it is not inclosed and under cultivation: *Ibid*, 482.

#### AGENT.

1. The general rule that a principal is bound by the acts of his agent, and a client by those of his attorney, does not hold good when the acts of the agent or attorney were done in pursuance of a fraudulent confederation of the agent or attorney with the party who seeks to maintain such acts of the agent or attorney: *Heilbrouer vs. Douglass*, 32 Texas, 215.

2. Factors being special owners of property consigned to them, when the transit is complete, may make a valid sale of the property to third parties, and if not specially instructed by their principals as to time or terms of sale, they are not liable to imputation of bad faith for selling it at the lowest ebb of the market, unless they purposely ignored intelligence of a probable rise in the market: *Ward vs. Bledsoe*, 32 Texas, 252.

See CONFEDERATE MONEY, 4.

#### ALIEN ENEMY.

1. The act of Congress of July 12, 1861, empowering the President to prohibit, by proclamation, all commercial intercourse between

the rebellious and the loyal States, and the proclamation of the President, in pursuance thereof, issued August 16th, 1861, prohibiting such intercourse, were not designed to deprive creditors in the adhering States from the use of all such remedies for the collection of their debts as the laws of those States gave them: *Mixer et al. vs. Sibley et al.*, 53 Ill., 61.

2. Such intercourse as is inconsistent with actual hostilities, was forbidden, and that is, not negotiation or contract, but actual locomotive intercourse between individuals of the belligerent States. The law and the proclamation were aimed at commercial transactions and commercial objects only, and not to arrest the proceedings of courts of justice: *Id.*

#### ARBITRATION.

In a suit in Chancery, a reference was made to the master, and pending such reference, the parties mutually agreed to submit the matters in difference to three persons as arbitrators, upon whose award the court should have power to enter a decree. The arbitrators made their award, that the bill should be dismissed. At the next term of the court, an order was entered discontinuing the suit, for the reason that the matters in dispute had been submitted to arbitration. This was proper. The submission of the pending suit operated as a discontinuance thereof: *Cunningham vs. Craig*, 53 Ill., 252.

See CONTRACTS, 9.

ASSETTS.—See ADMINISTRATION, 9.

#### ASSIGNMENT.

1. It is no defense to a promissory note, against an innocent assignee, that the note when delivered was left in blank as to the time of payment, and this blank was afterwards improperly filled by the payee: *Elliot vs. Levings et al.*, 54 Ill., 213.

2. It is no defense to a promissory note, in the hands of an innocent holder, for value, assigned before maturity, that the payee fraudulently obtained possession of the same, or that the instrument was stolen from the maker, or otherwise wrongfully put into circulation: *Clark vs. Jackson*, 54 Ill., 296.

3. It is no defense to an action upon a promissory note, by the assignee against the maker, that the consideration of the note be-



tween the maker and the payee, was a wager on the result of the presidential election, where the assignee received the note in good faith, for a valuable consideration before maturity: *Shirley vs. Howard*, 53 Ill., 455.

4. Where the assignment of a promissory note is without date, the law raises the presumption, subject to be rebutted, that the transfer was made before maturity. And, in such case, in an action by the assignee against the maker, it devolves upon the defendant to overcome this presumption by proof: *Richards vs. Betser*, 53 Ill., 466.

#### ASSUMPSIT.

1. Where a contract has been performed, and nothing remains to be done but to pay the money, a recovery therefor may be had under the common counts: *County of Jackson vs. Hall*, 53 Ill., 441.

2. Where a party contracted to build a county jail, and to receive in payment therefor the bonds of the county, and, upon completion of the building, did receive the bonds, which were afterwards, however, repudiated by the county authorities as invalid. *Held*: The county having denied the validity of the bonds, the party doing the work could recover the price agreed to be paid therefor, in money, and under the common counts—the county having repudiated the bonds, would be estopped to assert their validity so as to defeat the action: *Ibid*, 441.

#### ATTACHMENT.

1. Where an original attachment issued and a summons of garnishment is served upon a party, who dies before the return day of process, his administrator can not be required to answer said garnishment. In such a proceeding, the garnishee is required to answer on oath, whether he is indebted to the absconding debtor, and if so, how much? This being peculiarly within his own knowledge, the action can not be prosecuted against his representatives: *Tate vs. Moorehead et al.*, 65 N. C., 681.

2. Where one is summoned as a garnishee in an attachment, and owes a note which is negotiable, he has a right to insist upon the production and surrender of the note, or upon an indemnity, as in the case of a lost note, before a judgment is taken against him upon his garnishment: *Ibid*, 681.



3. In an action against a sheriff for the recovery of personal property alleged to have been' improperly attached, or for its value, where the complaint contains no allegation that the levy was excessive, the plaintiff can not avail himself of the fact that the evidence showed that the levy was excessive, so as to entitle him to a recovery for the excess: *Sexey vs. Adkinson*, 40 Cal., 408.

4. Where a creditor of the mortgagor of personal property causes the same to be seized by legal process for the satisfaction of his debt, he acquires thereby a lien upon the property, subject to the rights of the mortgagee, and may sustain an action against the latter to redeem the property, or for other proper equitable relief: *Morgan et al. vs. Spangler et al.*, 20 Ohio, 38.

5. In this State, a title acquired under foreign bankrupt or insolvent proceedings, will not prevail over the lien of creditors attaching under our own laws, property found here. Accordingly, where, in a suit commenced in this State against foreign debtors, citizens of Massachusetts, a warrant of attachment had been issued, and, upon the arrival of a sea-going vessel at the port of New York, such debtor's interest in the ship was seized by the plaintiff, as sheriff, under such attachment, and the defendants claimed as assignees of such debtors, appointed under the insolvency laws of Massachusetts prior to the issuing of the warrant. *Heid*: That the lien acquired by the levy must prevail over the title of such assignees; and this, although at the time of the assignment, the vessel was not within our territory, but in the Pacific ocean: *Kelly vs. Craps*, 45 N. Y., 86.

6. To constitute a levy upon real estate under an attachment, nothing more is required to be done by the officer, than some act with intent to make the property liable to the process. This will constitute a seizure, and create a lien against the debtor, and all claiming under him by title subsequently acquired, except *bona fide* purchasers and encumbrances: *Rodgers vs. Bonner*, 45 N. Y., 379.

See CONTRACT, 6.

#### ATTORNEY AND CLIENT.

1. The statute of limitations does not begin to run upon the claim of an attorney for services and disbursements until the termination of the proceeding in which they were rendered and disbursed, where his employment was to conduct such proceeding to its termination: *Mygatt vs. Wilcox*, 45 N. Y., 306, (6 Hand.)

2. Administrators, who retain an attorney to attend for them in proceedings against them on a final accounting before the surrogate, are jointly liable to such attorney, although their interests upon a distribution are different: *Ib.*

3. An attorney is not authorized by his retainer to satisfy a judgment without payment, and if he does so, the court will set such satisfaction aside; and although an attorney should hold the judgment by assignment, as security for debts due from his client, his satisfaction without payment, is good only for the amount of his interest: *Beers vs. Hendrickson*, 45 N. Y., 665. .

### BAGGAGE.

Where the baggage of a passenger is placed in the charge of the carrier, and upon arriving at his place of destination, the passenger leaves it in charge of the carrier, the duty and liability of the carrier as such, will not be changed to that of warehouseman, until the baggage is stored in a safe and secure warehouse. If the baggage be placed in an insecure room, and is stolen, the carrier will be held responsible in that capacity, not as warehouseman. The same rule applies, in this regard, to the carrying of baggage, as in case of ordinary freight: *Bartholomew vs. St. Louis, J. and Chicago R. R. Co.*, 53 Ill., 227.

### BAILMENT.

1. The delivery of personal property to another, by the owner, to be taken care of, and returned at a stated time, upon the terms that the latter is to be compensated out of its increase, is a mere bailment for the benefit of both parties, and does not divest the title of the true owner: *Robinson vs. Haas*, 40 Cal., 474.

2. The purchaser of property, from a bailee, stands in privity with the latter and the letters of the bailee, written to his bailor, or other admissions of his, while in possession, going to show how he held the property, are proper evidence against the bailee, or his transferee: *Ibid.*

3. Before a consignee of goods can sell the property consigned to him, contrary to express instructions, for the purpose of reimbursing himself for advances, he must first give reasonable notice to the consignee to pay him for such advances: *Hallowel et al. vs. Fawcett*, 30 Iowa, 490.

## BANKS AND BANKING.

1. The certificate of stock in a National Bank contained a provision that the stock was not transferable until all the liabilities of the stockholders to the bank, were paid. *Held*, that such an agreement gave the bank no lien upon the stock for subsequent indebtedness of the stockholder, and was void, as prohibited by the Act of Congress, (Act of 1864, 13 U. S. Statutes, 99.) The bank could only acquire an interest in its stock by a purchase, to prevent a loss upon a debt previously contracted in good faith. *Held*, also, that a debt due from the stockholder, arising from collections made by him for the bank, was a "loan" within the meaning of the act: *Conklin vs. The Second National Bank of Oswego*, 45 N. Y., 655.

2. The plaintiff deposited with the defendant certain bonds, as security for a loan payable on demand, and subsequently made overdrafts upon his account with the defendant, to a large amount. The defendant, learning of such overdrafts, and claiming a banker's lien upon the bonds therefor, as well as for the loan, and being unable to give notice or make demand upon the plaintiff, so'd the bonds; without any demand or notice, and at private sale. The surplus of avails after satisfying the loan, was credited upon the overdraft, but afterwards the defendant sold and transferred to a third person the whole amount of such overdraft. The plaintiff, after tender of the amount of the loan and demand of the bonds, sued for the conversion thereof. *Held*, that the sale of the bonds at private sale was unauthorized, and the plaintiff could elect, either to affirm such sale and claim the benefit of the surplus in reduction of his overdraft, or repudiate the sale and credit of surplus, and hold the defendant responsible for the bonds; held, further, that the plaintiff having repudiated the sale, the defendant's transfer of its claim on account of overdraft, precluded it from using any part thereof by way of off-set or counter claim, notwithstanding the consideration for such transfer was much less than the amount so overdrawn: *Strong vs. National Mechanics Banking Association*, 45 N. Y., 718.

3. When a genuine check, drawn by one of its customers upon a bank, is presented by the drawee to that bank for deposit, it is substantially a demand of payment by the holder of the check. If the bank accepts the check and pays it, either by delivering the currency, or giving the party credit for it as a deposit, the transaction is closed between the bank and such party. And where the amount of a check, so presented, was credited to the holder upon his deposit tick-

et by the officers of the bank. *Held*, the bank became liable for the amount of the check, although on the same day, and before the close of banking hours, but after it had paid other checks of the drawers presented later, it returned the check to the depositor as not good, and although the account of the drawer was overdrawn at the time of the deposit: *Oddie vs. The National City Bank of New York*, 45 N. Y., 735.

### BILLS OF EXCHANGE.

If commercial paper, when received upon the sale of property, by the vendor, at the risk of the vendee as to its payment, or as a security upon a pre-existing debt, becomes valueless through the *laches* of the party receiving it, the loss must be borne by him, and he can not recover the price of his goods or his debt: *Darnall vs. Morehouse*, 45 N. Y., 64.

### BILLS AND NOTES.

1. A member of a firm after dissolution, without authority from his co-partners, renewed firm notes by giving a new note in the firm name. The new note, without any intent to defraud, was made to bear interest at the rate of ten per cent, and to include the individual note of one of the partners. The defendant, a member of the firm, supposing the new note was simply a renewal of the firm notes at six per cent. interest, promised to pay it. *Held*, that the note given in renewal was binding on the defendant for the amount of the firm notes surrendered on the renewal, with simple interest from that time: *Wilson vs. Foster*, 20 Ohio, 89.

2. The drawer of a check payable to the order of the plaintiff, delivered it to a third person in exchange for property of the plaintiff, such third person claiming to be the plaintiff, and saying he could identify himself at the bank. In ignorance of the circumstances under which the check was given, the bank paid the check to the bearer without inquiry, on the forged indorsement of the plaintiff's name. *Held*, 1st, that the plaintiff could ratify the act of the drawer in giving the check, and by such ratification the check became his property, for the amount of which he could maintain an action against the bank. 2. The fact that the drawer, with notice of the plaintiff's claim against the bank, subsequently lifted the check, and was charged with its amount in his settlement with the bank, did not affect the rights of the plaintiff: *Dodge vs. National Exchange Bank*, 20 Ohio, 234.

3. If a promissory note be given in settlement of an account, of which some of the items are for intoxicating liquors sold by the payee to the maker, to be drank on the premises where sold, in violation of the statute in such cases made and provided, the consideration of such note is partly illegal, and the whole note is therefore void: *Widoe vs. Webb*, 20 Ohio, 431.

4. The liability of the drawer or indorser of a bill of exchange is not fixed, unless there has been a demand for payment and notice given of the failure to pay, and these must be proved on the trial: *Flowers vs. Bitting*, 45 Ala., 448.

5. Notice of the protest of a note or bill of exchange may be given to the indorser through the post office, notwithstanding the place where payment was to be made, and where the demand and protest were made, was that of his residence, when the holder, who is the owner, lives elsewhere: *Philippe vs. Harbelee*, 45 Ala., 597.

6. A note made payable to "the estate of T. A. Thornton," and signed by the party to be charged, is a written contract, ascertaining the demand, and is evidence of the existence of a debt which the executor may recover as assets of the estate: *Hendricks vs. Thornton*, 45 Ala., 299.

7. It is no defense in an action on a promissory note by an indorsee thereof—that the defendants were accommodation makers—though it was received by the plaintiff with knowledge of that fact, if it was taken in good faith and for value in the usual course of business: *Winters et al. vs. The Home Insurance Company*, 30 Iowa, 171.

8. Nor would the fact that the note was negotiated to the plaintiff by one of the makers, who was the real debtor, instead of the payee, change the rule: *Id.*

9. A promise of payment by an indorser, with full knowledge of the facts respecting the demand and notice, waives his right to subsequently insist upon their insufficiency: *Allen vs. Harrah*, 30 Iowa, 362.

10. The defense that the signatures of the makers to a promissory note were obtained by fraud, can not be made against a *bona fide* holder for value before maturity: *Loomis et al. vs. Metcalf et al.*, 30 Iowa, 381.

11. A claim against the husband can not be pleaded as a set-off in an action by the wife, on a note which he has legally transferred to her, and which is her property: *Stannus vs. Stannus*, 30 Iowa, 447.

## BROKER.

1. A contract for the sale and purchase of shares of the stock of a railroad corporation, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent. per annum," effects a sale *in presenti*, the vendor becoming a quasi trustee for the purchaser, and the latter is entitled to all dividends accruing on such shares thereafter: *Currie vs. White*, 822; 45 N. Y.

2. When the vendor gives notice within the time, of his option to deliver, the rights of the parties become the same as though the time of delivery named by him had been specified in the original contract. *Ibid.*

3. If the purchaser, pursuant to such notice, at the time named therein, offers, and is ready to take and pay for the stock, and the vendor neglects to deliver, or offer to deliver, a tender of the money is not necessary, as payment and delivery are to be simultaneous: *Ibid.*

4. If the purchaser makes distinct and separate demands, one for the shares purchased, with dividend accrued thereon, the other for the additional shares of new stock, he may recover the subject of the former demand, although not entitled to that of the latter: *Ibid.*

## CARRIER.

1. While a passenger train of a railroad company was crossing a bridge, constructed on the line of its road, over a creek, the bridge gave way, its central pier having been undermined by the waters of the creek, and the train was precipitated into the creek, killing a passenger who had about his person a package of money which he was carrying for the plaintiff. By this accident the stoves on the train were overturned, setting fire to the debris of the cars, and consuming the package of money with the body of the passenger. Upon suit brought by the owner of the money to recover from the railroad company for the value of the package, his petition stated the foregoing facts, and charged that the accident occurred through the negligence and unskillfulness of the defendant in the construction and maintenance of the bridge, and in the running of the train. On demurrer to this petition, on the ground that it did not state facts sufficient to constitute a cause of action: *Held*, 1st, That the case stated in the petition does not come within the operation of the maxim which requires every one so to conduct his business as not to

do injury to another. 2d, That the defendant, as a common carrier of passengers, is not liable for the loss of money kept in the sole custody of a passenger, and which he carries, without notice to the defendant, for a purpose unconnected with the expenses of the journey, notwithstanding such loss was occasioned by the negligence of defendant's servants, and that the demurrer to the petition was well taken: *First Nat. Bank of Greenfield vs. M. & C. R. R. Co.*, 20 Ohio, 259.

2. In an action against a railroad company to recover damages for delay in transporting a lot of hogs, it appeared the contract was, that the company should not be liable for loss "by delay of trains, or any damage said property might sustain, except such as might result from a collision of a train, or when cars were thrown from the track in course of transportation." During the trip, one car was thrown from the track by reason of a broken rail, while all the cars containing the hogs remained on the track: *Held*, the company were liable for whatever hogs were lost, or whatever shrinkage occurred by reason of the delay occasioned by the accident: *Ill. Cen. R. R. Co. vs. Owens et al.*, 53 Ill., 391.

3. In an action against a railroad company to recover for injury to a quantity of corn, occasioned by delay in the transportation of the same, the defendants can not claim exemption from liability under a clause in the bill of lading which releases them from loss on perishable property. Mature, merchantable corn can not be regarded of that character: *Ill. Cent. R. R. Co. vs. McClellan*, 54 Ill., 58.

4. Railroad companies are common carriers, and where they receive goods to carry, marked to a particular place, they are bound, *prima facie*, under an implied agreement from the mark or direction, to carry to, and deliver at that place, although it be a place beyond their own line of carriage: *Ill. Cen. R. R. Co. vs. Frankenburg et al.*, 54 Ill., 88.

5. A contract made by a railroad corporation to transport and deliver goods at a point beyond the terminus of its own line, contained the following clause: "Unavoidable accidents of the railroad, and of fire in the depot, excepted:" *Held*, that in the absence of proof of any other or new contract, this exception would be held to extend to every other carrier through the whole line of transportation, and that in an action against a connecting carrier, the goods having been lost while in its possession, such carrier could claim the benefit of it: *Maghee vs. The Camden and Amboy Railroad Company*, 45 N. Y.



6. When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way, or by a particular route, he is bound to obey such directions; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and can not avail himself of any exception in the contract. *Ibid.*

7. But if it should be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default or deviation, the carrier should be excused. The burden of proof of this fact, however, is on the carrier. *Ibid.*

8. When goods are shipped under a verbal agreement for the transportation thereof, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading, by its terms, limited the liability of the carrier, and expressed on its face that by accepting it the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shippers omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped: *Bostwick vs. The Baltimore and Ohio Railroad Company*, 45 N. Y., 712.

See BAGGAGE.

#### CAUSE OF ACTION.

1. The plaintiff purchased a ticket of the defendants, a railroad corporation, at a point on their line, for New York, and had his baggage checked for that city. He arrived there by the Hudson River Railroad, a connecting line of road, at nine o'clock in the morning, and about noon of that day gave his check to an expressman in the city of Brooklyn, with directions to get the trunk from the depot of the Hudson River Railroad for him. The expressman neglecting to do so, when two days afterwards, the plaintiff demanded the trunk at the depot, it could not be found. The defendants had, in pursuance of an arrangement with the Hudson River Railroad Company, transferred the baggage to the latter at Albany, and it had been conveyed by them to New York and deposited in their depot. In an action brought by the plaintiff to recover the value of his trunk and contents: *Held*, that he was entitled to recover, in the absence of any proof on the part of the defendants accounting for the failure to deliver it: *Burnell vs. New York Central Railroad Company*, 45 N. Y., 184.



2. Money paid upon a contract for the sale of goods, invalid under the statute of frauds, can not be recovered back from a vendor who is ready to perform on his part: *Allis vs. Read*, 45 N. Y., 142.

3. In consideration of the assignment to him by the plaintiff of an interest in a patent, the defendant bound himself to pay the plaintiff \$1,000 before the end of the next year, or "re-assign the patent:" *Held*, the year having elapsed without payment, and the defendant having a few days thereafter, on the money being demanded, offered to re-assign, that no action would lie against him upon his obligation to recover the \$1,000. By its terms, he had the option during the whole year, to pay the price, and upon his failure to do so within that time, the plaintiff's only remedy was to compel the re-assignment, or in case of refusal, to recover whatever might be its value: *Manvel vs. Holdredge*, 45 N. Y., 151.

4. Where services are rendered under a contract void by the statute of frauds, no action can be maintained to recover their value, except upon the default of the other party, or his refusal to go on with the contract: *Galvin vs. Prentice*, 45 N. Y., 162.

5. A verbal agreement was entered into between the plaintiff and defendant, by which the latter agreed to bid off in his own name, and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for that purpose for the joint benefit of both. The plaintiff was to re-imburse one-half of the money so paid; the deed to be taken in the name of both: *Held*, the defendant having bid off the land in his name and taken a contract thereof, but refused to convey one-half of the contract to the plaintiff, that no action would lie to compel the execution of the agreement: *Levy vs. Brush*, 45 N. Y., 589.

6. An action will not lie against an owner of land, who, in digging a well upon his own premises, intercepted the percolation or underground currents of water, and thereby prevented their reaching the springs or open running stream on the soil of another. The rule is different when the water has actually reached and become a part of the spring or stream, and is substracted from it: *The Village of Delhi vs. Yonmaw*, 45 N. Y., 362.

7. Where there are no fraudulent representations made, or deceit practiced, and no warranty given of the actual number of acres of a growing crop sold, the vendor is not liable for the discrepancy between the actual number and the number as represented by him. The same principle is applicable to a claim for damages on account of the condition of buildings sold: *Harsha vs. Reid*, 45 N. Y., 415.

8. A covenant by the owner of land not to permit a grist-mill to be erected thereon, is not a covenant running with the land, charging an unnamed assignee. It is a personal contract, binding only the covenantors and their personal representatives. An action will lie against no one but the covenantor for a breach of this covenant; and a subsequent grantee of the lands will not be liable upon it: *Ibid.*

9. Upon decreeing specific performance of a verbal contract for the conveyance of real estate, upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quality, or other matters touching the estate: *Ibid.*

10. But a court of equity can not give a personal judgment in damages against a defendant, for an independent cause of action growing out of a contract void by the statute. An existing equitable cause of action, for a specific performance, will not create and secure to the party an independent cause of action, which would not exist and could not be enforced but for the equitable right of action: *Ibid.*

11. An instrument in writing conveyed to the defendant all the interest of A., in certain premises, with a right of entry on breach of condition subsequent: *Held*, that the defendant, by accepting the conveyance, became bound to perform the stipulations on his part recited therein, although he had not executed it. The right of re-entry being attached to covenants, gave them the force of conditions: *Chamberlain vs. Parker*, 45 N. Y., 569.

12. Loss may be sustained, in a legal sense, by the breach of a contract, notwithstanding it can be shown that performance would have been a positive injury to the plaintiff, as in case of a failure to perform an agreement to erect a useless structure upon the plaintiff's own premises; but this rule does not extend to the erection of a structure upon land in which the plaintiff has no interest, and as to which he is under no obligation: *Ibid.*

13. If an illegal tax is collected and paid into the treasury of a county, an action as for money had and received will lie against the county for its recovery: *Newman vs. Supervisors of Livingston County*, 45 N. Y., 676.

14. The money having come to the treasury of the county by the wrongful act and with the knowledge of its officers, no demand is necessary before suit, nor is it necessary to present the claim therefor to the board of supervisors for audit and allowance: *Ibid.*

See LIMITATION, 5.

#### CHANCERY.

1. Even though a court of law may have the power under the statute, to correct a judgment which has been fraudulently changed by increasing the amount for which it was rendered, it not being clear, however, that such power exists, still that would not oust a court of equity of its jurisdiction. Fraud is a matter of chancery jurisdiction, and that court would not lose it merely by the statute conferring a similar jurisdiction upon courts of law: *Babcock vs. McCumant, et al.*, 53 Ill., 215.

2. Where the surety on a note secured by mortgage brought suit for the purpose of obtaining a decree of foreclosure in his favor, and the payee filed an answer resisting the relief sought by the surety, but filed no cross-bill nor asked for any relief: *Held*, it was error to decree a foreclosure for the benefit of the payee: *Conwell et al. vs. McCowan et al.*, 53 Ill., 363.

CHECK.—See BANKS AND BANKING, 3; BILLS AND NOTES, 2.

COLOR OF TITLE.—See ADVERSE POSSESSION, 2, 3, 5.

#### COMPROMISE.

1. In an action of covenant on a lease, brought by the lessor, the defendant pleaded to the whole declaration, setting up that the parties, having divers disputes concerning the subject matter of the suit, as a compromise and settlement thereof, before suit brought, agreed the lease should be surrendered and annulled, and the same was surrendered and cancelled, and the possession given to the plaintiff: *Held*, the plea was bad, because it did not aver the plaintiff accepted the possession: *Burroughs vs. Clancey*, 53 Ill., 30.

2. A mere executory verbal agreement, without consideration by the holder of a promissory note, to accept from the maker a less sum than is due thereon, will constitute no defense to a suit on the note. Even the payment of a less sum of money than the real debt would be no satisfaction of a larger sum, without a release by deed: *Tilsworth vs. Hyde et al.*, 54 Ill., 386.

CONFEDERATE MONEY.

1. Parties who, during the late rebellion, contracted on the basis of Confederate money, and thus speculated on the chances of the failure of the government, whose authority they contemned, must abide the results,—they need not look to the courts to effectuate contracts which, no matter how remotely or contingently, contemplated the destruction of the Government: *Donley vs. Tindale*, 32 Tex., 43.

2. The plea in this case, to the effect that the note sued on was payable in Confederate money, presented a good defense to the action, notwithstanding that the note on its face called simply for "dollars," and it was competent for the defendant to establish that defense by parol proof: *Ib.*

3. Payment in Confederate notes during the rebellion, which were accepted without objection at the time they were made, can not be avoided on the ground that they were received only because the recipient stood in dread of the rebel authorities, who then denounced and threatened all persons who refused to accept Confederate money in discharge of their dues. Such general apprehension is not duress: *Vander Hoven vs. Nettle*, 32 Tex., 181.

4. A payment of Confederate money in satisfaction of an open account, made to and accepted without objection by an agent and attorney of the creditor, is held a good payment in this case, although there is no evidence in the record of any special authority conferred on the agent to receive such currency: *Burleson vs. Cleveland*, 32 Tex., 397.

5. In a contract, the consideration of which was Confederate notes, it is immaterial whether the party first agreed to pay money for such notes, or to pay property for them, and then executed a promissory note for the property, the consideration, which was the basis of the promise, being Confederate notes, was illegal, null and void: *George vs. Terry*, 26 Ark., 160.

6. A contract, the consideration of which was Confederate money, is illegal and void: *Waymack vs. Heilman, et al.*, 26 Ark., 449.

CONFLICT OF LAWS.

The *lex loci contractus* determines the nature, validity, obligation and legal effect of a contract, and prescribes the rule of its construction and interpretation, unless it appears to have been made with reference to the laws and usages of some other State or government,

as where it is to be performed in another place; when, in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation. Upon principles of comity, effect is sometimes given by the courts of a State to foreign laws; but in matters of contract such effect is conceded to the statutes of other States, only to carry out the intent of the parties, never to qualify or vary the effect of a contract made between persons not citizens of such foreign State, or subject to its laws, and not made with reference to those laws: *Dike vs. The Erie Railway Company*, 45 N. Y., 113.

### CONSIDERATION.

1. The concurrent doctrine of the text books on the law of contracts, is, that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be *unlawful*, the promise is void. When, however, for a legal consideration, a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest, it will be rejected, and the remainder established. But this can not be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful, because the whole consideration is the basis of the whole promise. The parts are inseparable: *Widoe vs. Webb*, 20 Ohio, 435.

2. In an action at law by one partner, upon a promissory note, executed to him by his co-partner, it appeared that there was an omission, by mistake, of some items of account in the settlement upon which the note was given. *Held*: Even if such omitted items could be adjusted in an action at law between the partners, proof of them would only be admissible as showing a failure of consideration and not as a set-off: *Johnson vs. Wilson*, 54 Ill., 419.

3. By a properly drawn deed, the title of the grantor of lands, whatever it may be, passes to the grantee, without reference to the consideration paid; and it is not a matter which concerns third persons, whether there was a full consideration paid or not, so long as it is not in fraud of their rights: *Fetlow vs. Merrivether*, 53 Ill., 275.

4. To constitute a failure of consideration of a promissory note, there must be either a warranty or a false and fraudulent representation of the thing sold: *Richards vs. Betser*, 53 Ill., 466.

5. A promise to extend the time of payment of a debt is void, unless founded upon a good consideration; and the payment of part of the debt or the interest already accrued, or an agreement to pay interest for the future, is not a sufficient consideration for such a promise; nor will the giving of a new obligation with additional security for a part of the debt be a good consideration for a promise to extend the time as to the residue: *Parmelee vs. Thompson*, 45 N. Y., 58.

6. The discharge of a legal obligation by a debtor to his creditor is not a sufficient consideration for the promise of the latter. Accordingly, where a party, sued upon a note, paid the costs that had accrued in the suit, upon an agreement that it was to be discontinued and he was to have a month further time to pay the note. *Held*: That the promise to extend the time was void for want of sufficient consideration: *Ibid*.

See ASSIGNMENT, 3; BANKS AND BANKING, 2; BILLS AND NOTES, 3; CONFEDERATE MONEY, 5; CONTRACT, 8; LIEN, 2; RELEASE, 1.

### CONSTITUTIONAL LAW.

An act of Congress upon a subject within its jurisdiction, but upon which there has been State legislation, does not have the same effect upon the latter as would its repeal. Such act merely indicates the intention of Congress, from that time, to assume the exercise of the powers conferred by the Federal Constitution. The State law becomes from that time, inoperative, but is not repealed; the repeal of the act of Congress would leave the State law in full force. It can not be presumed that any rights or interest secured, or obligations incurred under it, (the State law,) were intended to be interfered with, and hence, a penalty incurred under the State law, before the act of Congress is passed, may be recovered afterward: *Sturgis vs. Spofford*, 45 N. Y., 446.

### CONSTRUCTION.

A deed with covenants for quiet enjoyment, contained the following clause: "Reserving always a right of way, as now used, on the west side of the above described premises, for cattle and carriages, from the public highway to the piece of land now owned by R—:" *Held*, That, although strictly a *reservation* in a deed is ineffectual to create a right in any person not a party thereto,

yet there being, in fact, a right of way existing at the time of the grant in R., such clause must be construed as an *exception* from the property conveyed; and that the grantor was not liable to the grantee as for a breach of his covenant: *Bridger vs. Pierson*, 45 N. Y., 601.

See CONTRACT, 20.

### CONTRACT.

1. Equity will decree specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing the premises for a fixed sum of money, on or before the expiration of the term: *Hall vs. Center*, 40 Cal., 63.

2. Where in pursuance of an agreement to convey land, the grantee presents a different deed to the grantor for execution than that called for in the contract, the grantor must make his objections to the deed, when presented or within a reasonable time, or when the possession of the premises is demanded. He can not be permitted to avail himself of it, for the first time, as a defense when sued for a breach of the covenant: *Morgan vs. Stearns*, 40 Cal., 434.

3. A verbal contract for the sale of land is not absolutely void, but voidable only at the election of either party. A creditor of the vendor in such contract can not require that considerations of equity, of good faith and moral obligation arising therefrom, shall be ignored, and the contract held void: *Lefferson vs. Dallas et al.* 20 Ohio, 68.

4. A contract for the sale of real estate does not of itself free the land from the lien of judgments against the vendor. It is the payment of the purchase money which entitles the purchaser to protection in equity; and to the extent that the purchase money remains unpaid when the lien attaches, the land will be bound: *Ib.*, 68.

5. Where the owner of land, by his written contract, agreed to give to a railroad company the perpetual right of way through the same, at a stipulated price, which was paid to him, with a provision in the contract, that when the road should be completed the company should fence the same: *Held*, That after the road is completed, the owner of the land can not, upon failure to put up the fence, eject the company from the land: *Hornback vs. Cincinnati and Ganessville R. R. Co.*, 20 Ohio, 81.

6. A producer of cotton, still ungathered, contracted verbally with his creditor that he, the producer, would gather the cotton and



take it to a designated gin-house, to be ginned and baled; that the creditor should furnish the baling and rope; take the cotton to market when baled; sell it, and apply the proceeds to the producer's indebtedness. The producer gathered the cotton and took it to the gin, where it was received as his property, and where it was soon afterwards attached by another of his creditors. A trial of the right of property ensuing between the attaching creditor and the other one, who claimed to be a purchaser by the above contract; it is *held*, that the contract did not constitute a sale of the cotton, or divest the property out of the producer as against the attachment: *Morgan vs. Taylor*, 32 Texas, 363.

7. The indispensable element of a delivery is wanting to constitute this transaction, a sale, or to change the property as against the attachment: *Id.*

8. In respect to the trouble, loss or obligation taken upon himself, by a promise, at the instance and request of the promisor, it is immaterial that the detriment or charge thus assumed is, in fact, of the most trifling description, provided it be not utterly worthless, in fact and in law, it will be a sufficient consideration to support a promise: *Maull vs. Vaughn*, 45 Ala., 134.

9. When a controversy arises about a debt contracted before the 25th of July, 1865, and the same is submitted to arbitration, and the arbitrators by their award require the debtor to give the creditor a bill of exchange, accepted by a third person, and this is accordingly done in pursuance of the award, such bill is not a renewal of the old debt, that is extinguished by the award: *Ware vs. Willis*, 45 Ala., 120.

10. Where there is no proof of positive fraud or imposition, the contract of an heir expectant to convey what may descend to him, by the death of the ancestor, is obligatory upon him, and such contract will be enforced by the courts: *Masten vs. Marlow*, 65 N. C., 695.

11. A person hired for one year, who is wrongfully dismissed before the expiration of the year, is not required to wait until the end of the year, but can sue at once, and is entitled to recover such damages as he has sustained by such wrongful dismissal. He may treat the contract as rescinded, and recover upon a *quantum meruit*: *Brinkley vs. Swicegood*, 65 N. C., 626.

12. If a seller receive a contract drawn on a bank, which is indorsed to him, and which he might have refused as not being in accordance with his contract, but kept it, presented it to the bank,



for payment, and sued upon it, instead of repudiating it and returning it to the buyer, it amounts to an acceptance of the check in satisfaction of the article sold; and the liability of the buyer is then only upon his indorsement: *Sellers vs. Johnson*, 65 N. C., 104.

13. The law requires contracting parties to be vigilant and to exercise due caution, and if the means of information are alike accessible to both, so that with ordinary prudence and diligence the parties might respectively rely upon their own judgment, they must be presumed to have done so: *Wilson vs. Strayhorn*, 26 Ark., 28.

14. The infringement or partial failure of performance by one party to a contract, for which there may be a compensation in damages, does not authorize a rescission or put an end to a contract: *Gallin et al. vs. Wilcox*, 26 Ark., 309.

15. A secret voluntary conveyance, made by an embarrassed creditor to another creditor in preference, is fraudulent and void as to general creditors, to that extent, but is binding on the parties thereto, and a court of equity will not relieve either party to such conveyance: *Noble et al. vs. Noble*, 26 Ark., 317.

16. Where a party who owes a debt secured by mortgage, enters into a contract with another, by which the latter is to assume the debt, and he in turn makes a contract with the mortgagee by which the mortgage is to be transferred to him upon the performance of certain conditions, so long as the mortgagee remains bound by this agreement, he can not foreclose the mortgage against the original debtor: *Crabtree et al. vs. Levings*, 53 Ill., 526.

17. And though the mortgagor was not a party to the contract between the mortgagee and such third person who assumed the debt, so as to enable him to maintain an action at law upon it, yet, in equity he was not a stranger to that agreement. He having furnished the consideration for making it, and it having been made for his benefit, he has the right in a court of chancery to invoke its protection, and prevent a foreclosure so long as the contract remains in force: *Ibid.*

18. Where a party agrees to convey to another, by warranty deed, a tract of land, the legal title to which is in a third person, under a just interpretation of the contract, the procuring of the conveyance of the land by such third person with his warranty, will not answer its requirement. The party who was to receive the deed is entitled to have the personal covenants of him who agreed to convey, as a further security for his title: *Ibid.*

19. The bringing of an action of forcible detainer by a vendor against his vendee in possession, for failure to pay the purchase money, does not operate to rescind the contract between them: *Wilburn vs. Haines*, 53 Ill., 207.

20. While extrinsic testimony of experts may be received to aid the court in construing a contract where it refers to principles of science or art, or where it uses the technical phraseology of some profession or occupation, or common words used in a technical sense, or uses new or unusual words, such testimony is not admissible where it is not apparent that the language is used in any such new, peculiar or technical sense, and the contract will be construed according to the established usage of language as applied to the subject matter: *Wilmering vs. McGaughey*, 30 Iowa, 204.

21. Where one party to an agreement abandons it, or disregards its provisions, the other party may treat it as no longer binding on him: *Turk vs. Nicholson*, 30 Iowa, 406.

22. Where a creditor entered into an agreement with a firm in respect to the management of the partnership property, upon which he had a lien for an indebtedness to him, and upon which indebtedness, in consideration of the agreement, he was to extend time of payment, it was *Held*, that a dissolution of the partnership by a withdrawal of one of the members, and the transfer of his interest to the remaining one, worked such an abandonment of the contract on the part of the partnership, as absolved the creditor from further observance of it on his part: *Id.*

23. It was further held, that if the remaining partner was entitled to the benefits of the contract, he would have to claim them in an action alone, and could not for that purpose, join in an action with the retiring partner: *Id.*

24. Parties engaged in a particular trade, resolved to take measures to test in the courts the validity of a statute affecting their business, and all signed the following paper: "We, the undersigned, hereby agree to pay our share of costs, equally divided, for the purpose of engaging counsel and to bring our cases before the courts," *Held*, that the instrument gave no authority to any number of the subscribers, less than all of them, to take any action under it, and that the delivery of this paper to the plaintiff, a counsellor at law, by a portion of the signers, calling themselves a committee, with a request that he act as counsel for all at a fixed rate, gave to the plaintiff

no right of action against any of the other signers: *Smith vs. Duchardt*, 45 N. Y., 597.

25. The defendant, owner of a vessel, entered into negotiations with the plaintiff to repair her. The plaintiff refused to limit the expenses to any fixed sum, but stated that, at a rough guess, he supposed the repairs would amount to \$6,000 or \$8,000. Afterward, the defendant wrote to the plaintiff directing him to make certain specified repairs, to observe the strictest economy, and saying, "If you find on further examination that it (the expense) will be likely to exceed the sum you have named, of \$6,000 or \$8,000, you will at once advise me, as I do not care to go beyond that sum." The vessel was in worse condition than supposed, and the defendant was so informed. The plaintiff's bill amounted to \$12,236.49. *Held*, that the completion of the repairs named in the letter was the primary and leading intent of the contract, without any condition other than the observance of the strictest economy, and that the plaintiff could recover the amount of his bill: *Carll vs. Spofford*, 45 N. Y., 61.

See ASSUMPSIT, 1, 2; BILLS AND NOTES, 6; BROKER, 1, 2; CARRIER, 2, 4, 5, 6; CAUSE OF ACTION, 4, 5; CONFEDERATE MONEY, 1, 5, 6; CONFLICT OF LAWS; CONSIDERATION, 1; LIEN, 3; SPECIFIC PERFORMANCE, 1, 2; STATUTE OF FRAUDS.

#### CONVEYANCE—See EQUITY.

#### CORPORATION.

1. A city has power to change the grade of its streets, and if not unskillfully or negligently done, it will not be liable for injuries to property resulting therefrom: *Russel vs. City of Burlington*, 30 Iowa, 261.

2. Lands lying within the extended limits of a city, which are used exclusively for agricultural purposes, which have not been benefitted by the current expenditures of the city, and are not necessary for municipal uses, are not liable to taxation for city purposes: *Deiman et al. vs. City of Fort Madison*, 30 Iowa, 541.

#### COVENANT.

1. If a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to

the buildings, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous: *Loughran vs. Ross*, 45 N. Y., 792.

2. Where personal property is sold with an express or implied warranty of title, the rule is the same as to eviction as upon a covenant for quiet enjoyment in deeds of real estate. A party, however, holding under a covenant for quiet enjoyment, when evicted, may maintain an action against his immediate vendor, or may, at his election, proceed against a remote grantor, who has conveyed the land with similar covenants. In the case of personal property, the vendee can only resort to his immediate vendor; there is no privity of contract between the last vendee and a remote vendor: *Bordwell vs. Col-lie*, 45 N. Y., 494.

3. A limited and specific grant of the right to dig and stone up a certain spring, and conduct the water therefrom through the grantor's land, by a specified pipe, to the grantee's house, with covenant of warranty, does not render the entire premises servient to the easement; and the grantor may lawfully sink another spring, but twenty-seven feet distant, although the effect is to render the first one useless: *Bliss vs. Greeley*, 45 N. Y., 671.

See CAUSE OF ACTION, 8, 11; CONSTRUCTION, CONTRACT, 2, 18.

#### COVENANTS FOR TITLE.

1. Where a deed of conveyance of land contains a covenant of warranty, and the covenantee takes possession and conveys to another, such covenant will pass to the second grantee, though the covenantor may not have been in possession of the land at the time of his conveyance: *Wead vs. Larkin et al.*, 54 Ill., 489.

2. Where a vendor of real estate agrees to remove all existing incumbrances upon the premises, a failure to remove them will constitute a defense in equity against the notes given for the purchase money, to the extent of the incumbrance; and such defense will be good, even against an assignee of the notes, before maturity, he having notice thereof when he received them: *Tenney et al. vs. Hemenway*, 53 Ill., 97.

#### DAMAGES.

1. Damages to be recoverable must be the proximate consequence of the act complained of, and not the secondary result thereof, either alone or in connection with other circumstances: *Dubuque Wood Co. vs. City of Dubuque*, 30 Iowa, 175.

2. A principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, but is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal: *Mendelsohn vs. Anaheim Lighter Co.*, 40 Cal., 657.

3. In an action for personal injury, unless the injury complained of was willful, mental suffering of the plaintiff, such as is produced by an injury to one's reputation by circumstances of indignity and contumely under which the injury was done, and the consequent public disgrace to the plaintiff, can form no part of the injury by a jury, in estimating the damages. In such case the only inquiry for the jury is, the bodily injury to the plaintiff, with such consequential damages as were the necessary result of the injury: *Ill. Cn. R. R. Co. vs. Sutton*, 53 Ill., 397.

4. A municipal corporation is not liable for more than compensatory damages, unless there be proof that the injury complained of was willful, which is hardly possible in the case of such a corporation: *City of Decatur vs. Fisher*, 53 Ill., 407.

See EVIDENCE, 14, 18; ACTION, 5; CAUSE OF ACTION, 7, 10; CONTRACT, 11; RAILROADS, 1; SHERIFF, 1, 2; TELEGRAPH COMPANY, 2; NEGLIGENCE, 1, 2.

### DEED.

1. Where a conveyance is made to the husband, or to the wife after the death of her husband, under a contract of sale, made by him in his lifetime, it is competent for the wife or any one claiming under her, to show by parol, that the consideration was paid out of her separate estate: *Ingersoll vs. Truebody*, 40 Cal., 603.

2. Where a deed to the wife recites a valuable consideration, not stated to be the separate property of the wife, the presumption of law is, that it is paid out of the common property, but this presumption may be rebutted by parol proof that it was paid out of a separate estate of the wife: *Id.*

3. A deed is not fraudulent and void because it was not read over to the party making it, before it was signed, if such party did not request it to be read, and signed it without any deceit being practiced upon him to procure its execution: *Hawkins vs. Hudson*, 45 Ala., 482.

4. A deed for land is not void for uncertainty because it fails to show in its recitals the county where the land is situate. Such a

defect is a latent ambiguity, which may be cured by parol proof: *Ibid.*

5. When a party can not write his own name, he must make his "mark." His name must be written near it, and witnessed by a person who writes his own name as a witness, in order to make the signature complete and legal: *O'Neal vs. Robinson*, 45 Ala., 526.

6. When a debtor conveys realty to a creditor by deed, absolute in appearance, and at the same time gives his note for the amount of such indebtedness, and takes a bond for title upon the payment of such note: *Held*, that such transaction is a mortgage: *Robinson vs. Willoughby*, 65 N. C., 520.

7. To determine whether a transaction is a mortgage or a defeasible purchase, it will be regarded as the former, if at the time of the supposed sale the vendor is indebted to the vendee, and continues to be such with a right to a reconveyance upon the payment of such indebtedness: *Ibid.*

DEFENSE.—See ASSIGNMENT, 1, 2, 3.

BILLS AND NOTES, 7, 10; CONFEDERATE MONEY, 1, 2; LIMITATIONS, 6.

#### DELIVERY.

Where there has been a sale of personal property, which is at another place than that at which the contract is made, and the agent of the vendor, by direction of the latter, places the property in a railroad car, consigned to the purchaser, that will amount to a delivery; the possession of the carrier will be considered the possession of the purchaser: *Pike vs. Baker*, 53 Ill., 164.

See EXPRESS COMPANIES, 1, 2.

#### DIVORCE.

A single act of cruelty does not constitute sufficient ground for divorce. There must be extreme and repeated cruelty, which must consist in physical violence, and not merely in angry or abusive epithets, or even profane language to authorize a divorce in this State. Mere angry or abusive words, menaces or indignities, do not constitute cruelty within the meaning of our statute: *Embree vs. Embree*, 53 Ill., 394.

#### DOWER.

1. The separate estate of the widow, when less than her dower

interest and distributive share, does not exclude her entirely, but proportionally from her life interest in the estate of her husband: *Billingslea vs. Glenn*, 45 Ala., 540.

2. The dower of the widow vests in her on the death of her husband, and determining to what extent her right to it is affected by her separate statutory estate, both the dower interest and the separate estate must be estimated at their respective values at the time of the death of the husband: *Ib.*

### DURESS.

By an agreement between the parties to a suit a judgment was entered therein, with a stay of execution for a certain time. Before that time elapsed, the plaintiff sued out an execution upon the judgment, and placing it in the hands of the sheriff went with him to the defendant's place of business, threatening to make a levy, and close up his store, unless he settled the debt at once. The defendant, fearing such a course would prove ruinous to his business, and to avoid the threatened levy, paid a part of the debt and gave his notes with security for the balance, due at a shorter time, than that fixed for the stay of execution: *Held*, the notes were extorted by the improper use of illegal process, and were without consideration, and a Court of Chancery would restrain the plaintiff in the judgment from assigning them, and compel him to abide by the terms of his agreement as to the stay of execution: *Thurman vs. Burt*, 53 Ill., 129.

See CONFEDERATE MONEY, 3.

EASEMENTS.—See COVENANT, 3.

### EQUITY.

Where an instrument of conveyance, defective for want of a certificate of acknowledgment, is not made on any valuable as contradistinguished from a merely meritorious consideration, but is made by a father, in consideration of love and affection, to one of his sons, and children of a deceased son, and the grantor in the instrument dies without making any other disposition of the premises intended to be conveyed, and without ever having made any provision for another son not named in the instrument, equity will not uphold the instrument as a deed of conveyance as against the latter: *Hout vs. Hout et al.*, 20 Ohio, 119.



### ESTOPPEL.

1. A vendor of land who, in his deed, affirms his seizin or possession of the land, is estopped by his deed from afterwards denying that he had title; and after his death his heirs are in like manner estopped from denying his title, and from claiming the land by descent from him, even under a title acquired in his right after the deed was made by him: *Gould vs. West*, 32 Tex., 338.

2. When a vendor has conveyed land with a covenant of warranty against his heirs, the covenant will operate as a rebutter to a claim of his heirs to the land, even though he conveyed the land wrongfully or before he had any title to convey: *Ib.*

3. In such a case, the heirs can not avoid the estoppel by impeaching the consideration of their ancestors' deed, when they do not allege that the deed was procured by any fraud or force: *Ib.*

4. An admission by a tenant of rent due from him to his landlord, upon the strength of which a third party purchases and receives an assignment of the claim from the landlord, will estop the tenant from afterward denying such indebtedness in a suit against him therefor by the assignee: *Bower et al., vs. Stewart*, 30 Iowa, 579.

See ADVERSE POSSESSION, 1; ASSUMPSIT, 2; WILL.

EXECUTOR—See BILLS AND NOTES, 6.

### EXEMPTION.

If an execution defendant voluntarily surrenders property levied upon without claiming its exception, he is thereby estopped from afterward asserting such claim: *Richards et al. vs. Haines*, 30 Iowa, 573.

EVICTION.—See COVENANT, 2.

### EVIDENCE.

1. The testimony of a witness which tends to contradict or limit the operation of deeds in evidence, one of which was executed to and another by the witness, should be excluded, when objected to on that ground: *Judson vs. Malloy*, 40 Cal., 299.

2. The declarations of any agent are not admissible in evidence against his principal until the fact of his agency is first proven: *Grigsby vs. Clear Lake Water Co.*, 40 Cal., 396.

3. The declarations of a wife made in the presence of her husband, and not denied by him in a conversation relating to her separate property, are competent evidence in an action by the devisees of the

husband, involving her title to the property: *Ingersol vs. Truebody*, 40 Cal., 603.

4. A vendor of land by deed with general warranty is a competent witness to prove that, before or at the sale, he notified his vendee of an outstanding vendor's lien on the land sold; and such evidence is not objectionable on the score of being in disparagement of the title conveyed by the witness: *Fraim vs. Frederick*, 32 Tex., 294.

5. The best evidence of the terms of an act of the Legislature is a copy of the enrolled bill, duly certified, and it was error to exclude such evidence when offered to show a variance between the statute as passed by the Legislature and as printed among the published acts: *Central Railway vs. Hearne*, 32 Tex., 547.

6. In an action against one of several joint makers of a promissory note, who pleads the statute of limitations, and the plaintiff seeks to avoid the bar of the statute by a payment indorsed on the note, before the bar was complete, he must prove affirmatively—the burden is upon him—that the payment was made by the defendant before the cause of action was barred: *Knight vs. Clements*, 45 Ala., 89.

7. Where an administrator, on a final settlement of his accounts, is sought to be charged for the value of property sold by him, on the ground that the sureties taken by him on the notes for the purchase money were not sufficient, the onus of proof is upon the administrator *de bonis non* who seeks to charge him: *Searcy vs. Holmes*, 45 Ala., 225.

8. In an action upon a simple contract, usury may be given in evidence under the general issue, treating the contract as void. And though in a suit upon a usurious bond it is necessary to plead the statute, it is not to bar the action, but to put the court into possession of the facts whereby it is shown that the contract was wholly void: *Pond vs. Horne*, 65 N. C., 84.

9. In putting a construction upon a deed or other written instrument, facts existing at the time to which the words used point, may be proved as a key to the meaning—just as the condition of a testator's family and estate at the date of his will may be proved, to aid in arriving at his meaning: *Richardson vs. Schlegehuich*, 65 N. C., 150.

10. In an action by an assignee of a promissory note against his assignor, it is not competent for the latter to prove a verbal agreement made at the time of the indorsement to the effect that he should not be responsible as indorser. The legal effect of the written indorsement can not be impaired by proof of a different parol agreement: *Mason vs. Burton*, 54 Ill., 350.

11. While the provisions of a deed can not be contradicted by parol, it is competent to prove by that character of evidence that the true amount of the consideration which passed between the parties was different from that expressed in the deed: *Booth et al. vs. Hynes et al.* 54 Ill., 363.

12. A party made an application in writing, signed by him, for insurance upon property; gave his note, payable to the insurance company, to the agent of the company, for the premium, and took from the agent a receipt showing the giving of the note, and stating that in case the policy should not be issued, the note was to be returned. These papers were regarded as the contract of the parties, which could not be varied or explained by parol evidence: *Winnesheik Ins. Co. vs. Halsgrafe*, 53 Ill., 516.

13. In a suit against a sheriff for a failure to seize and subject to sale under execution personal property shown to have been in possession of the defendant in the execution, it devolves upon the officer to show that such property was exempt from execution, or such facts as justify a failure to make a levy. The *onus probandi* in such case, is upon the officer: *Bonnel vs. Bowman*, 53 Ill., 460.

14. In an action on the case to recover damages for injury resulting from the erection and operating of a flaring mill by the defendant adjacent to plaintiff's dwelling house, whereby chaff, dust, &c., were thrown into and upon plaintiff's house, rendering it uncomfortable as a habitation, it is incompetent for the defendant to prove that the machinery used in the business was good, and the business properly managed, except where the plaintiff claimed vindictive damages on the ground of gross carelessness or wanton injury. Such evidence could not be received to show defendant was not liable to damages at all: *Cooper vs. Randall et al.* 53 Ill., 24.

15. In a proceeding to enforce a claim against an estate, the administratrix is a competent witness on behalf of the estate to show that a settlement of the claim was made between the claimant and the decedent prior to the death of the latter. Such witness does not come within the inhibition contained in Section 3982 of the Revision: *Stiles et al. vs. The Estate of Bolkin*, 30 Iowa, 59.

16. It is not incumbent on the plaintiff in an action on a promissory note, to prove the genuineness of defendant's signature, where the same is not denied under oath in the defendant's answer: *Clinton National Bank vs. Torry*, 30 Iowa, 85.

17. In an action to recover of defendant the amount paid by the plaintiff in the satisfaction of a judgment obtained against him by a third party upon a note executed by him to the defendant, the consideration of which has failed, and by him assigned to the party recovering the judgment, the petition in the action in which the judgment was obtained, and also the judgment itself, are admissible in evidence to show the amount of the recovery which the plaintiff was compelled to pay: *Hall vs. The Aetna Manufacturing Company*, 30 Iowa, 214.

18. The opinion of a witness as to the amount of damages a party has sustained by reason of an injury to his property, is not admissible. He may state the items and facts showing the extent and manner of the injury, but from these it is the province of the jury to find the aggregate amount of the damage sustained: *Russel vs. City of Burlington*, 30 Iowa, 261.

19. In a suit between landlord and tenant, it is not admissible on the part of the former to show, for the purpose of establishing that the lease was made with certain stipulations, that he had that year rented premises to another tenant with like stipulations, and that that was his rule with all his tenants: *McKivitt vs. Cone*, 30 Iowa, 454.

20. In an action to recover for personal injuries caused by the defendant's car, in which the plaintiff was a passenger, leaving the track, alleged to have occurred on account of the defective condition of such track; *Held*, that the admission of evidence, on behalf of the plaintiff, of the condition of the road at a point half a mile distant from the place of the accident, and evidence that new ties were subsequently put in at points in the neighborhood of the accident, was erroneous: *Reed vs. The N. Y. Central R. R. Co.*, 45 N. Y., 574.

See ADMINISTRATION, 1, 8; ASSIGNMENT, 4; BAILMENT, 2.

#### EXPRESS COMPANIES.

1. The defendants, a joint stock association, carrying on business as expressmen, and who were also freight agents of the Pacific Mail Steamship Company, received from the plaintiff merchandise in a package marked "C. O. D.," to be conveyed from New York to San Francisco, giving him a bill of lading signed by them as agents for the steamship company. At the plaintiff's request, they agreed to deliver the goods to the consignee, and to collect the amount due thereon, which amount they were to return to the plaintiff. Subse-

quently, while the goods were in the defendant's warehouse, and after the consignee had been several times notified to call and take them away, which he had promised to do, they were destroyed by the explosion of a package of nitro-glycerine. In an action brought by the plaintiff to recover the value of the goods, *Held*, that he was not entitled to recover, and that the liability of the defendant was that of warehousemen only: *Weed vs. Barney*, 45 N. Y., 344.

2. Carriers by vessels and railways, having transported the goods to their dock or station nearest to the residence of the consignee, and notified him of their readiness to deliver, are not bound to make personal delivery, but this exemption does not extend to express companies: *Witbeck vs. Holland*, 45 N. Y., 13.

FEME COVERT—See ACTION, 2.

FIXTURES—See COVENANT, 1.

#### FORCIBLE ENTRY AND DETAINER.

1. In the action of forcible entry and detainer, the title to the premises is not involved, and the introduction of a deed to the plaintiff, if for such purpose, is not allowable; but for the purpose of establishing the extent of his claim, it is admissible. It is also admissible to show the *animus*, the intention with which the party entered, in connection with the possession and improvements on a farm, to which a wood lot is an adjunct, the latter being the land in controversy: *Pearson vs. Herr*, 53 Ill., 144.

2. The possession of a farm draws to it the possession of the woodland belonging to it, though not inclosed, especially if repeated and unchallenged acts of ownership are shown: *Ibid*.

#### FORECLOSURE.

1. The purchaser at a mortgage foreclosure sale, is not entitled to the rent of the premises accruing between the time of purchase and the time of delivery of the deed to him: *Cheney vs. Woodruff*, 45 N. Y., 98.

2. In an action for the foreclosure of a mortgage, sale of the premises and satisfaction of the debt secured, all persons having liens upon the equity of redemption are necessary parties: *Morris vs. Wheeler*, 45 N. Y., 708.

See CHANCERY, 2; CONTRACT, 16, 17.

## FORFEITURE.

Where a vendor of land has a right by the terms of the contract to declare a forfeiture in case the purchaser fails to comply on his part, where he holds no securities of a negotiable character, he has only clearly to manifest an intention to end the contract, and by selling the property to another, he does, in the most unequivocal manner, make his declaration of forfeiture: *Warren et al. vs. Richmond*, 53 Ill., 52.

See INSURANCE, 2.

## FORMER ADJUDICATION.

1. A party can not re-litigate matters which he might have interposed, but failed to in a prior action, between the same parties or their privies, and in reference to the same subject matter: *Hackworth Guardian vs. Zollars*, 30 Iowa, 432.

2. The force of a plea of former adjudication can not be negatived by the fact that there is a variance between the description of the land in controversy as stated in the petition, and that in the decree rendered in the former action, if it appears from the whole record that the lands as described are substantially the same: *Id.*

3. If certain claims (as for rents and profits in an action of right,) are put in issue by the pleadings, and not withdrawn or dismissed, they will be treated as *res adjudicata*, and the opposite party entitled to judicial immunity from another action therefor, though the original judgment recites that no evidence was introduced in respect thereto, and that the same were, therefore, not considered by the court: *Schmidt vs. Zahensdorf*, 30 Iowa, 497.

FRAUD—See ACTION, 6; AGENT, 1; ASSIGNMENT, 2; CAUSE OF ACTION, 2, 7; CONSIDERATION, 4; TRUSTS, 4, 5; CHANCERY, 1.

## FRAUDULENT CONVEYANCES.

1. Fraud may be shown against any deed, and evidence tending to show fraud in the execution of a deed, to hinder or delay creditors, is relevant, and should be admitted: *Blair, Adm'r, vs. Alston*, 26 Ark., 41.

2. The rule in equity that a party, seeking to set aside a contract, must place or offer to place the opposite party in *statu quo*, is not applicable to a case where a deed has been obtained by fraud and without a valid consideration: *Freeman et al. vs. Reagan*, 26 Ark., 373.

3. Where a debtor has property more than sufficient to pay his debts, he has a right to provide a home for his wife and children, leaving property sufficient to satisfy his creditors; and if he procures a conveyance to be made to secure that end, it will not be deemed fraudulent as to creditors: *Gridley vs. Watson, Adm'r*, 53 Ill., 186.

#### GARNISHMENT.

1. The guest of an inn-keeper may be garnisheed in an action by a creditor against the inn-keeper. It seems that debts due by a municipal or political corporation, are the only exceptions to the operation of the statute respecting the garnishment of creditors of a debtor: *Caldwell vs. Stewart, Garnishee*, 30 Iowa, 379.

2. But if the inn-keeper requires the guest to pay, or pledge payment, in advance of his keeping, no indebtedness arises that is the subject of garnishment: *Id.*

See ATTACHMENT, 1, 2.

#### GUARDIAN AND WARD.

1. If a guardian, or his personal representative after his death, for his own benefit dispose of a bond which was on its face payable to him as guardian, the ward may follow the bond or its proceeds in the hands of the assignee or holder. And in such case, the face of the bond will be of itself, express notice to the assignee or holder, of the breach of trust by the guardian, or by his executor or administrator: *Lemly vs. Atwood*, 65 N. C., 46.

2. A guardian, who, before the late civil war, took from the administrator of the father of his ward, certain promissory notes as a part of the effects of his ward, but did not collect them and lend the money upon bonds with sufficient security taken to himself as guardian, is not responsible for the amount of them if they were lost by the events of the war without any default on his part, but he is responsible for the annual interest, which he might have collected and invested for their benefit: *Whitford vs. Fox*, 65 N. C., 265.

HEIRS.—See ESTOPPEL, 1, 2, 3.

#### HOMESTEAD.

1. It is not a fraud upon creditors, for a debtor, even if in insolvent circumstances, to buy a homestead which would be beyond their reach: *Cipperly et al. vs. Rhodes, &c.*, 53 Ill., 346.



2. An insolvent debtor will not be deprived of the benefit of the homestead exemption, where he purchases property with his own money; merely because he procures the legal title to be vested in his wife, it being his intention, when he purchased it, to hold the property as and for a homestead: *Ibid.*

### HUSBAND AND WIFE.

1. Where husband and wife join in a contract for the sale of her land, and in pursuance of the terms of the contract, their joint deed for the land, executed and acknowledged according to law, is placed in the hands of a third person, to be delivered by him to the purchaser upon his paying the purchase money, the husband and wife may enforce a specific performance of the contract on the part of the purchaser: *Farley vs. Palmer and Wife*, 20 Ohio, 223.

2. Where a husband purchased real estate in his own name, making partial payment for it with money which was the separate statutory estate of the wife, and the property was subsequently sold under a decree of the Chancery Court for the payment of the remainder of the purchase money, a bill in Chancery by the wife to subject the property to the re-payment of her money, filed against her husband's vendor and the purchaser at the Chancery sale, which does not allege knowledge on their part of the use of her money in derogation of her right, is without equity: *Shepherd vs. Schaefer*, 45 Ala., 233.

3. A wife, living with her husband, can not during coverture, contract a debt in her own name for loaned money, and bind her statutory separate estate by a mortgage to secure the payment of the money thus loaned, on her credit, save for the purpose named in the statute and in the manner therein required: *Wilkinson vs. Cheatham*, 45 Ala., 337.

4. If a *feme covert*, who has a separate estate by contract, jointly makes with her husband a promissory note for the husband's debt, if she has a separate estate by contract, it will be inferred, in a court of equity, that she thereby intends to charge such separate estate with its payment: *Nunn's Adm'r vs. Givhan's Adm'r*, 45 Ala., 370.

5. Real estate that came to a *feme covert* by descent, before the present system relative to the estates of married women, was not her separate estate. The husband, by the marriage during coverture, was entitled to the possession and management of it, and to receive the rents and profits thereof: *Ibid*, 370.

6. Where the wife took a mortgage upon personal property from her husband, to secure to her a *bona fide* debt, and caused such mortgage to be duly recorded, and left the property in the husband's control and possession, it was *held*, that her right thereto under the mortgage was paramount to that of a subsequent vendee of the husband, although she had not recorded any other notice of her ownership under revision. Sections 1502 and 2499: *Goodrich vs. Munger et al.*, 30 Iowa, 342.

See EVIDENCE, 3.

INCUMBRANCE.—See COVENANTS FOR TITLE, 2.

#### INDORSER.

To release an indorser on the ground of extension of time, given by the indorsee to the maker, or on further security given by the maker to the indorsee, it must be shown that a consideration was paid or promised for the delay or further security: *Hasard vs. White*, 26 Ark., 155.

#### INSURANCE.

1. While a stipulation in a policy of life insurance, that if the answers to the questions contained in the application "shall be found in any respect untrue," the policy shall be void, constitute such answers a warranty of their correctness in every particular, yet the language of such questions is, nevertheless, to have a reasonable construction in view of the purposes for which they were asked: *Wilkinson vs. The Conn. Mutual Life Ins. Co.*, 30 Iowa, 18.

2. A forfeiture of a life insurance policy, by reason of the violation of the condition against residing in restricted territory, may be waived by acts of the company or its authorized agents, inducing the policy holder to the belief that the condition has been dispensed with and the policy continued in force: *Walsh vs. The Aetna Life Insurance Co.*, 30 Iowa, 133.

INTEREST.—See BILLS AND NOTES, 1.

#### JUDGMENT.

1. Where a vendor of land receives a part of the purchase money, and takes notes for the residue thereof, retaining the title

until such notes shall be paid, and afterwards a judgment is obtained and docketed against him, and he then dies, the judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes will be assets when collected for the payment of debts: *Moore vs. Byers*, 65 N. C., 240.

2. A judgment confessed by executors, will bind them in their individual capacity, though they style themselves as executors in making such confession: *Hall vs. Craig*, 65 N. C., 51.

3. All judgments for money must be certain, and find the sum for which they are rendered, and failing so to do, they are fatally defective: *Pittsburg & C. R. R. Co., vs. City of Chicago*, 53 Ill., 80.

4. It is improper to render a judgment against a garnishee in a proceeding by attachment, in favor of the plaintiff in the attachment. It should be entered in the name of the debtor in attachment, as the plaintiff, and against his debtor, the garnishee, as the defendant: *Towner et al. vs. George et al.*, 53 Ill., 168.

#### JURISDICTION.

1. A judgment by default rendered by a justice of the peace, upon a notice served only four days before the day upon which the judgment was rendered, is not void for want of jurisdiction. It is not a case of no notice, but merely of defective notice, and the error of the justice in holding it sufficient must be corrected in the manner provided for the correction of other errors: *Shea vs. Quintin*, 30 Iowa, 58.

2. Want of jurisdiction can be taken advantage of by demurrer only when it appears on the face of the petition. A demurrer can not be aided by extrinsic evidence: *Childs vs. Limback*, 30 Iowa, 397.

#### LACHES.—See BILLS OF EXCHANGE.

#### LANDLORD AND TENANT.

Where a building has been injured by fire, the landlord can not be compelled to rebuild or repair it for the benefit of his tenant, unless he has expressly covenanted to do so; and this rule applies as well to the tenant who has hired a portion of the building which is not directly injured by the fire, as to the lessee of the whole building or of the part destroyed. Accordingly, where the roof and upper-story

of a building were partly destroyed by fire, and damage resulted to a tenant occupying the basement, by reason of the delay in repairing the roof: *Held*, error to charge the jury that it was the duty of the landlord to proceed with due diligence after the fire and put on the roof, and protect the tenants property from the weather, and that he was liable for any delay in so doing: *Dorfe vs. Genin*, 45 N. Y., 119.

See EVIDENCE, 19.

## LEASES.

1. Where there is a lease for years, and before the end of the term the interest of the lessor in the land is conveyed to a third person, or is sold under execution and purchased by such person, the rent reserved, which is not due at the time of the conveyance or sale, and sheriff's deed, passes with the reversion to the purchaser, and can not, therefore, be subjected afterwards to the debts of the lessor: *Kornegay vs. Collier*, 65 N. C., 69.

2. Where A. made a lease for a term of years, and during the existence thereof he conveys the land by deed to B., the latter can recover for the rent which had accrued after the title to the land passed to him: *Ballard vs. Thomason*, 65 N. C., 436.

See COMPROMISE, 1.

## LIEN.

1. Where a creditor of the mortgagor of personal property causes the same to be seized by legal process for the satisfaction of his debt, he acquires thereby a lien upon the property, subject to the rights of the mortgagee, and may sustain an action against the latter to redeem the property, or for other proper equitable relief: *Morgan & Co., vs. Spangler et al.*, 20 Ohio, 38.

2. Where there is no consideration for a mortgage of real estate, other than a pre-existing debt of the mortgagor, and the mortgagee is not induced thereby to change his condition in any manner, he can not be regarded as a purchaser for value, and therefore is not entitled to the protection against prior liens afforded in equity to *bona fide* purchasers, although he had no notice of such liens: *Lewis vs. Anderson et al.*, 20 Ohio, 281.

3. While it is the rule that an ordinary vendor's lien for the purchase money of land, which exists not by virtue of any contract

between the parties, but merely by implication of law, is not transferable so as to be enforced in favor of an assignee of the notes given for the purchase money, yet when the lien of the vendor arises out of express contract, as by being reserved in the deed, and such reservation recognized on the face of the notes, it will pass to an assignee of the notes, and may be enforced in his favor: *Carpenter et al. vs. Mitchel*, 54 Ill., 126.

4. Where the lien of the vendor of land arises out of express contract between the parties, it will not be deemed to be waived by the taking of other security for the payment of the purchase money, as would be the case of an ordinary vendor's lien: *Ibid*, 126.

See ATTACHMENT, 4, 5, 6; BANKS AND BANKING, 1, 2; CONTRACT, 4; JUDGMENT, 1; VENDOR AND PURCHASER, 1, 2, 3.

LIFE INTEREST.—See DOWER, 1.

#### LIMITATIONS.

1. If the statute of limitations had not barred a note when suit was brought upon it, neither will it defeat a mortgage made contemporaneously to secure the note, although the mortgage was not set up in the original petition, but by an amended petition filed at the time when limitations would have barred the note if suit had not been brought on it. The mortgage being but an incident of the debt, subsists as long as the debt does: *Eborn vs. Cannon*, 32 Tex., 231.

2. An averment that the plaintiff had labored under mental disability and temporary insanity, was sufficient, if sustained by the proof, to prevent the statute of limitation from running against him so long as such disability existed: *Forbes vs. Moore*, 32 Tex., 195.

3. To suspend the statute of limitations, or to remove the bar when it once attaches, there must be an acknowledgment of the debt, or a promise to pay it. If it be an acknowledgment simply, it must be express and to the effect that the debt is due at the time. If it be a promise, that also must be express and pre-supposes an acknowledgment: *Ringo vs. Brooks*, 26 Ark., 540.

4. The acknowledgment or promise must clearly identify the debt, must identify it with such certainty as will determine its character and the amount due. It must be made to a party in interest, to the person to whom the debt is due, or one authorized to act for him, and with the intent to pay it at the time: *Ibid.*, 540.

5. To render a pleading demurrable on the ground that its cause of action is barred by the statute of limitations, it must affirmatively appear therefrom that its cause is so barred: *Multon vs. Walsh*, 30 Iowa, 360.

6. The defense of the statute of limitations is an affirmative one, and the party pleading it, must show the facts constituting the bar: *Harlin vs. Stevenson*, 30 Iowa, 370.

See ACTION 3; ATTORNEY AND CLIENT, 1.

LOAN.—See BANKS AND BANKING, 1.

#### MASTER AND SERVANT.

1. Where a local railway agent was instructed to remit daily to headquarters of the company all sums of money received over ten dollars, it was *held* that he would be allowed a reasonable time, in view of his other duties, to make the remittance, and was not liable for money stolen from him, which he did not receive in time to remit as instructed: *Robinson vs. Ill. Cen. R. R. Co.*, 30 Iowa, 400.

2. It was further *held*, that the mere fact that he might have procured a sum of money which it was his duty to remit, and in time to do so, from another agent in whose possession it was, and who delivered it to him, but not in time to remit, would not render him liable in the absence of any showing that it was a part of his duty to go to such agent and procure the money received by him: *Id.*

#### MECHANICS' LIEN.

1. A mechanic's lien can only cover labor performed and materials furnished by the party claiming it, including labor performed by persons employed by him, and material purchased by him on his own credit and used in the construction; but it does not extend to materials or labor (although actually paid for by the claimant) procured by him as the agent for the defendant, and in his name and on his credit: *Kerby vs. Daly*, 45 N. Y., 84,

2. Accordingly, where it is found that the plaintiff, a claimant of a mechanic's lien against the defendant, had made a special contract, for and in behalf of the defendant, with a third party, to do certain work on the building, and that he had subsequently paid the whole sum due under such contract: *Held*, that the sum so paid could not be included in the plaintiff's lien upon the premises: *Ibid.*

MENTAL SUFFERING.—See DAMAGES, 3.

## MISTAKE.

1. A purchaser of land with warranty of title, being sued by an indorsee of a note given for the purchase money, pleaded as a defense that there was a mistake as to the land which was the subject matter of the trade, and that the plaintiff was privy to the trade, and knew of the mistake. It appearing that the defendant went into possession at the time of the purchase, and still remained in possession, and there being no allegation of fraud, and no evidence that the plaintiff knew of any mistake, if there was any, it is *held* that the defense was not maintainable: *Nichols vs. Hill*, 32 Tex., 516.

2. To allow such a defense would be equivalent to allowing a purchaser of land with warranty of title, to sue and recover on the covenant before covenant broken, and before eviction: *Ib.*

See ADMINISTRATION; 7 PARTNERSHIP, 5.

## MORTGAGE.

1. When several debts are secured by a mortgage, for some of which debts there are sureties who are not parties to the mortgage, the mortgagee becomes the trustee for the sureties to the amount of the funds thus provided for their indemnity; and upon a sale of the mortgaged property, the mortgagees must see that their just proportion of the proceeds of the sale is applied to the discharge of the debt on which the sureties are bound: *Fielder vs. Varner*, 45 Ala., 429.

2. If such mortgagor is also the principal on the debt on which the sureties are bound, on a sale of the mortgaged property, the portion of the proceeds of such sale applicable to the debt on which the sureties are bound, will be credited as a payment *pro tanto* on the debt, and the sureties to that extent discharged: *Ibid.*, 429.

3. Where there is a mortgage for the security of several debts, some of which include amounts for usurious interest, and others only include amounts for legal interest, upon a sale of the mortgaged property, and an appropriation of the proceeds thereof, if there are no preferred debts, the funds must be appropriated without regard to the amount of the illegal interest, if the mortgagor assents to such appropriation, notwithstanding the fact that some of the debts secured by such mortgage, and for which debts there were sureties, would be paid in full, if the amount of such illegal interest should be deducted from the debts secured by the mortgage: *Fielder vs. Varner*, 45 Ala., 429.



4. A mortgage is not fraudulent on account of usury in the debt intended to be secured, when the usury is not so excessive as to render the debt a simulated one: *Baskins vs. Calhoun*, 45 Ala., 582.

5. The Chancery Court may reform a mortgage against a judgment creditor who has notice of the mistake before a sale under his execution: *Ib.*, 582.

6. A trustee, under a mortgage containing a power of sale, can not become a purchaser at his own sale, either directly or indirectly, by procuring another person to purchase for his benefit, and if he does so become the purchaser, the right of the mortgagor will remain precisely the same as though no sale had been made: *Roberts et al. vs. Fleming et al.*, 53 Ill., 196.

7. A mortgagee, under a power in the mortgage, sold the property, but improperly became the purchaser himself, indirectly through a third person. A part of the same property had been previously sold upon execution, under a prior judgment lien, and the time of redemption allowed to expire, so that the purchaser obtained a sheriff's deed. The mortgagee after his sale under the mortgage, purchased in the title to the portion sold under execution, and as to that portion it was held, upon a bill filed to redeem, he had the title in fee, not subject to redemption by the mortgagor or a junior mortgagee, or those claiming under them: *Ibid.*, 196.

8. Where a mortgage is given on lands to secure the payment of certain promissory notes, conditioned that if any of the notes prove to be insolvent or worthless, the mortgage is to be good and valid, otherwise to be null and void. To constitute a breach of the condition, the notes, or some of them, must prove worthless. The mere non-payment of the notes does not constitute a breach: *Fetrow vs. Merriweather*, 53 Ill., 275.

9. In an action of ejectment by the grantee of the mortgagor, against a grantee of the mortgagee in possession, where the defendant relies upon the mortgage, with such a condition to protect his possession, to make his defense availing, he must show that the makers of the notes are insolvent, or the notes worthless, as otherwise the condition would not be broken: *Ibid.*, 275.

10. Where a mortgagee in a mortgage upon lands, given to secure a promissory note executed for the purchase money, negotiates the note to a third person, and then enters in proper form satisfaction of the mortgage upon the record, such entry of satisfaction will protect a subsequent *bona fide* purchaser of the land from the mortgagor, if

he had no notice at the time of such purchase, or the payment of the consideration, that the note was unpaid, or that the entry of satisfaction was unauthorized: *Cornog vs. Fuller et al.*, 30 Iowa, 211.

11. The rule of the common law, that, by a mortgage of real property the legal title is conveyed to the mortgagee, who is vested with the legal estate of freehold, and inheritance is not recognized by the weight of American authorities. In this country it may be considered the rule that the mortgagor is the owner of the lands mortgaged, and retains the inheritable estate therein: *White vs. Rittenmeyer*, 30 Iowa, 267.

See DEED, 6, 7; CONTRACT, 16; LIMITATIONS, 1.

### MUNICIPAL CORPORATIONS.

1. A municipal corporation was, by an act of the Legislature, authorized to take lands for a public park, and the act declares that the land so to be taken shall be a public place; and provides, that in ascertaining the compensation to be paid the owners, a just and true estimate of the value of the land is to be made, together with the tenements, hereditaments and appurtenances, privileges and advantages, to the same belonging, without deduction for benefits and advantages; and declares, that on fulfilling the requirements of the act, the lands shall vest forever in the city, and that whenever the city shall become vested with the title to the park, as provided, it might sell any building, improvements, or other material thereon; and authorizes the issue of bonds by the city, to obtain the fund to pay for the lands taken, declaring the lands pledged for the payment of such bonds. *Held*, that the city acquired an absolute estate in the lands taken under this act, and not an easement, and that such title was free from any legally recognizable reversionary right in the owners: *Brooklyn Park Commissioners vs. Armstrong*, 45 N. Y., 234.

2. The title of the city thus acquired, is impressed with a trust to hold the lands for the public use as a park, and it can not, of itself, convey or dispose of them in contravention of the trust; but it is within the power of the Legislature to relieve the city from such trust, and to authorize a sale, free therefrom: *Ibid*.

See DAMAGES, 4.

### NEGLIGENCE.

1. It is gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to

come from, a cashier of a bank, and to be dated at another station, at the request of a party known to the operator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and this negligence occurs so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence: *Elwood vs. Western Union Telegraph Company*, 45 N. Y., 549.

2. In an action against a railroad company to recover damages resulting to the plaintiff by reason of injuries received by him in leaping from defendant's train of cars, the plaintiff being a passenger on the train while the cars were in motion, at a station where the train did not stop, it was *Held*, that even if the plaintiff leaped from the car on suggestion of the conductor, and the conductor only gave it as his opinion that the plaintiff could leap from the train in safety, it was his duty to exercise his judgment whether or not it was safe, and if the danger was so apparent that a prudent man similarly situated would not have attempted the leap from the train, then the plaintiff was guilty of negligence, and should not be permitted to recover. The plaintiff, if left to act voluntarily, and not under constraint, was bound to exercise ordinary prudence: *C. & A. R. R. Co., vs. Randolph*, 53 Ill., 510.

See ACTION FOR DAMAGES, 1, 2; ADMINISTRATION, 4; CARRIER, 1, 2, 3; CORPORATION, 1; RAILROADS, 1.

NEW LEASE.—See COVENANT, 1.

NOTICE.—See ADMINISTRATION, 10; BAILMENT, 3; BILLS AND NOTES, 2, 4, 5, 9; BROKER, 2, 3; CARRIER, 1; GUARDIAN AND WARD, 1; MORTGAGE, 10; PARTNERSHIP, 3.

#### OFFICER.

1. A judicial officer is not civilly liable for judicial acts, though his decisions in respect thereto be erroneous, where it is not shown that he acted maliciously or corruptly; and this rule applies to inferior as well as superior tribunals: *Londegan vs. Hammer*, 30 Iowa, 507.

2. In an action against a Justice of the Peace for false imprisonment, evidence on the part of the defendant that he was, and had been acting as, a Justice of the Peace *de facto*, is admissible, and

when shown he will be presumed to have been duly appointed to the office, until the contrary appear: *Id.*

PAROL.—See DEED, 1, 2, 3.

### PARTIES.

1. An indorser, in full, of a promissory note payable to bearer, may be joined in a suit against the maker, and the action may be properly commenced in the county where the indorser resides, though the maker resides in a different county: *Stout & Co., vs. Noteman et al.*, 30 Iowa, 413.

2. In a proceeding to enforce against an estate the specific performance of a contract to convey real estate executed by the decedent, the administrator is a proper but not a necessary party, and the proceeding may be against the heirs alone: *Judd vs. Moseley*, 30 Iowa, 422.

### PARTNERSHIP.

1. The proceeding provided for by Section 3291 of the Revision, where partnership property has been levied upon to satisfy the individual debt of one of the partners, was not intended to change the common law rule respecting the primary liability of partnership property to the claims of creditors of the firm, and to those of co-partners for the amount of their respective shares, or for moneys advanced: *Richards et al. vs. Haines et al.*, 30 Iowa, 573.

2. The principal object of the proceeding is to determine the extent of the interest of the execution defendant, that of co-partners for the amount of their shares or money advanced, and the amount of the indebtedness of the firm to creditors, and to protect the interests of all by declaring and enforcing their respective rights: *Id.*

3. If a partner purchases property with the partnership effects, and sells said property to a *bona fide* purchaser without notice, the other partners can not follow the property in the hands of such purchaser: *Chipley vs. Keaton*, 65 N. C., 534.

4. By an arrangement between certain parties, one was to furnish money and the other was to buy cattle with it for the market. The party furnishing the money was to have his capital returned, with five per cent. interest thereon, together with one half the profits on the sale of the cattle: *Held*, The parties to this arrangement were not partners, as the one furnishing the money was exposed to no hazard of loss: *Adams vs. Funk*, 53 Ill., 219.

5. Where two partners, upon a settlement of their partnership affairs, ascertain and agree upon a balance due from the one to the other, it becomes unnecessary to file a bill in Chancery for a settlement of the partnership accounts; and an action of assumpsit will lie for the amount found to be due, as upon an account stated. But where upon an attempted settlement between them, a mistake is made in the statement of the account, assumpsit will not lie, and the remedy is by bill in Chancery for a settlement of the partnership accounts: *Hanks vs. Baber*, 53 Ill., 292.

See ACTION, 4.

#### PAYMENT.

1. A creditor has the right to appropriate payments made on account generally, where no specific directions have been given to apply them: *Sprague et al. vs. Hasenwinkle*, 53 Ill., 419.

2. Where payments are made upon an open account, or there are several distinct debts existing, and neither the debtor nor the creditor has made any specific application of the payments, it would seem to be a reasonable presumption that the first items, or the debt first in point of time, should be first discharged: *Ibid*, 419.

See ASSUMPSIT, 2; ATTORNEY AND CLIENT, 2; BANKS AND BANKING, 3; CAUSE OF ACTION, 3; CONFEDERATE MONEY, 3, 4; CONSIDERATION, 5; MORTGAGE, 2, 10.

PERSONAL PROPERTY.—See COVENANT, 2; EVIDENCE, 13.

POSSESSION.—See COVENANT FOR TITLE, 1; DELIVERY, FORCIBLE ENTRY AND DETAINER, 2.

PRESUMPTION.—See DEED, 2; PAYMENT, 2.

#### PRINCIPAL AND AGENT.

1. The testimony of a witness that he was acting as agent for his alleged principal, in respect to a certain transaction, carries with it the inference that he was so acting as their authorized agent: *Hall vs. Aetna Manf. Co.*, 30 Iowa, 214.

2. The power to collect money is not included in the power to loan, nor can it, in the absence of proof of ratification, or the like, be inferred therefrom: *Austin vs. Thorp*, 30 Iowa, 375.

3. Nor would the case be varied by the fact that the agent took as security for the loan he was authorized to make, a deed of trust in which he was constituted the trustee: *Id.*

See DAMAGES, 2; EVIDENCE, 1.

PRIVITY OF CONTRACT.—See COVENANT, 2.

PURCHASER.

1. When a purchaser of land, upon taking a bond for title, gives in payment thereof a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note can not, in case of such defect in the title of the land, recover on the note, though he took it before due: *Howard vs. Kimball*, 65 N. C., 175.

2. A purchaser of land is entitled to all that he bargained for, and is under no obligation to accept a part only, with warranty as to the other part, or to accept compensation, unless the part to which good title can not be made, does not materially affect the value, and it is seen that the objection is not taken upon the merits, but only as a pretext to get rid of the purchase: *Ibid.*

QUANTUM MERUIT.—See CONTRACT, 11.

RAILROADS.

1. To entitle a plaintiff to recover of a railroad company, damages on account of fire resulting from sparks emitted from one of its engines, the negligence of the company in the premises must be shown either directly or by circumstances tending to establish it, such as the absence or imperfect condition of a spark arrester, the use of an excessive amount of steam, unlawful rate of speed, or the like. The mere fact that the fire was occasioned by the sparks does not make a *prima facie* case against the company: *Gandy vs. The C. & N. W. R. R. Co.*, 30 Iowa, 419.

2. A railroad company is liable for stock killed on its track by reason of its failure to keep in repair the fences erected on the line of its road; but before such liability will attach, they must have knowledge either actual or implied, that the fence is out of repair, and a reasonable time thereafter to put it in proper condition. And

this rule applies where bars or gates have been left open by third parties: *Aylesworth vs. The Chicago, R. I., & P. R. R. Co.*, 30 Iowa, 458.

### RELEASE.

1. An agreement to extend the time of payment, to operate as a release of the surety, must be on sufficient consideration, legal and binding. It must be such an agreement as can be interposed to prevent a recovery on the debt, such as suspends the action and without the concurrence of the surety. If the agreement be a *nudum pactum*, or illegal, the rights of the creditor as against the surety, will remain unimpaired: *Galbraith vs. Fullerton*, 53 Ill., 126.

2. Neither of the parties to an unexecuted, usurious or unlawful contract, is bound by it, or estopped from repudiating the same, where such party would derive no benefit, or acquire an advantage he did not previously hold, by such repudiation: *Ibid*, 126.

RENT.—See FORECLOSURE, 1.

RESCISSION.—See CONTRACT, 14, 19.

RES ADJUDICATA.—See FORMER ADJUDICATION.

### SALES.

1. Personal property is bound from the time the execution comes into the hands of the sheriff; and where there are several executions coming to hand at different times, and a sale under the last, the proceeds should be applied in satisfaction of the others in their order: *Hanover et al. vs. Casey, &c.*, 26 Ark., 352.

2. In the agreement for the sale of goods, when the price is to be subsequently fixed by means agreed upon, until the price is so fixed, there is no such action or contract as amounts to a perfect sale or delivery: *Hutton, Adm'r, vs. Moore, Adm'r*, 26 Ark., 382.

See CONTRACT, 6, 7.

SATISFACTION.—See COMPROMISE, 2; MORTGAGE, 10.

SEPARATE ESTATE.—See HUSBAND AND WIFE, 2, 3, 4, 5.

SETTLEMENT.—See ADMINISTRATION, 8, 11.



SET-OFF.—See BANKS AND BANKING, 2; BILLS AND NOTES, 11; CONSIDERATION, 2.

### SHERIFF.

1. When an execution is issued on a judgment which is not a nullity, the sheriff, on receiving the execution, has no choice but to obey its mandate. He must return the writ and execution thereof, as required by law. If he fails to do this, he incurs the liability for damages imposed by the statute for such failure: *Noble et al., vs. Whetstone*, 45 Ala., 361.

2. The bankruptcy of a defendant in a judgment is not a sufficient excuse for the sheriff, on a motion against him and his sureties for damages accruing in favor of the plaintiff on the sheriff's failure to return an execution issued on such judgment: *Ibid*, 361.

### SPECIFIC PERFORMANCE.

1. When there has been a part performance of a parol contract for the sale of lands, and the vendee has been let into possession and has made actual improvements upon it, with the knowledge and acquiescence of the vendor, the contract is not within the reason of the statute of frauds; and this court, as well as most of the courts of the American States, will uniformly compel a specific execution of the contract: *Howes' heirs vs. Rogers*, 32 Tex., 218.

2. Upon decreeing specific performance of a verbal contract for the conveyance of real estate, upon the ground of part performance, the court will be governed by the same principles in adjusting the equities of the parties as upon a written contract, valid by the statute of frauds; and if the seller is not able fully to comply with the contract, the buyer has his election, either to have the contract specifically performed, so far as the seller can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quality or other matters touching the estate: *Harsha vs. Reed*, 45 N. Y., 415.

See CAUSE OF ACTION, 9, 10; CONTRACT, 1; HUSBAND AND WIFE, 1.

### STATUTE OF FRAUDS.

Where the plaintiff agreed verbally with the defendants, for the purchase of a quantity of cloths, no portion of the purchase money

being then paid, or goods delivered; but, subsequently, when, by the first arrangement, a payment became due, the parties again met, and upon further negotiations and agreements, varying somewhat the original void contract, the plaintiff delivered to the defendants, one F.'s promissory note, which was to be collected and applied by them on the purchase price of the cloths; and he, also, consigned to them certain other merchandise, which they were to sell, and also apply the avails, after deducting their commissions, to the purchase price of the cloths: *Held*, That the minds of the parties must be deemed to have then met upon all the terms and conditions of the agreement, for the sale of the cloths, and that it then became by the plaintiff's transfer of the note and consignments of merchandise, a valid and binding contract, under the statute: *Allis vs. Read*, 45 N. Y., 142.

STATUTE OF LIMITATIONS.—See LIMITATIONS; EVIDENCE, 6.

SUBROGATION.—See ACTION, 3.

TAXATION.—See CORPORATION, 2.

#### TELEGRAPH COMPANIES.

1. The lines of two telegraph companies terminated at S., the one leading from O. to S., and the other from S. to R. Messages passing over the line of the former company for transmission beyond S. to R., were customarily received by the latter company. The plaintiff at O. sent a message to R., paying for the whole distance: *Held*, That no partnership or mutual agency could be inferred from such facts. Each of the companies, in the absence of evidence of a special agreement or arrangement, either with the sender of the message, or between each other, will be liable for his own acts, but not for the acts and defaults of the other: *Baldwin vs. The W. S. Telegraph Company*, 45 N. Y., 744.

2. The rule of damages, recoverable for the non-delivery of, or mistake in delivering, telegraphic messages, is the natural and necessary consequence of the breach of contract as contemplated by the parties, interpreting the contract in the light of the circumstances under which, and the knowledge by the parties of the purposes for which, it was made; and when a special purpose is intended by one party, but is not known to the other, and is not indicated by the

message itself, such special purpose will not be taken into account in the assessment of damages for the breach of contract to send. The damages in such a case will be limited to those resulting from the ordinary and obvious purpose of the contract: *Ibid.*

See NEGLIGENCE.

### TENDER.

1. When a debtor tenders money in payment of his debt to the creditor, who says he has no use for it, and thereupon the debtor concludes to retain the money awhile longer, and does so, he thereby waives the tender: *Ferrell vs. Walker*, 65 N. C., 91.

2. To make a tender effectual, the debtor must be ready, willing and able to pay, and must so inform his creditor, and must also produce the money, unless such production be waived by the absolute refusal by the creditor to receive it: *Ibid.*

3. A plea of tender is of no avail unless it is accompanied by a payment into court of the amount admitted to be due: *Jenkins vs. Briggs*, 65 N. C., 159.

### TRUST.

1. A resulting trust can not be established in favor of a plaintiff upon a mere allegation of a verbal agreement, to the effect that he was to be jointly interested with defendant in the purchase of the property, and in the absence of any averment that he paid a portion of the purchase money at the time of the purchase: *Roberts vs. Ware*, 40 Cal., 634.

2. A trustee can purchase at his own sale only when he does so without fraud, and with the consent of the *cestui que trust* at the time, or by his subsequent action: *Roberts vs. Roberts*, 65 N. C., 27.

3. A vendor who has contracted to sell his land is in equity a trustee for the purchaser, but if he has not received the whole of the purchase money he is not a mere naked trustee, and upon becoming a bankrupt his interest in the land will, by proper assignments, pass to the assignee in bankruptcy, under the 14th section of the bankrupt act: *Swepton vs. Rouse*, 65 N. C., 34.

4. The purchase by a trustee or agent of the property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it: *White vs. Ward & Wife*, 26 Ark., 445.

5. Any such purchase is an abuse of such confidence and relationship, and any title, benefit or advantage derived therefrom, by the purchaser, is, in equity, fraudulently acquired, and inures to the benefit of the *cestui que trust* or the principal: *Ibid*, 445.

See MUNICIPAL CORPORATION, 2.

### TRUST AND TRUSTEE.

Where trustees act within the scope of their authority, and exercise such prudence, care and diligence, as men of ordinary prudence, care and diligence, exercise in like matters of their own, they should not be held accountable for losses happening from their management of the trust funds: *Miller et al. vs. Procter et al.*, 20 Ohio, 442.

See BROKER, 1; MORTGAGE, 1, 6.

UNCERTAINTY.—See DEED, 3.

### USURY.

Where a note tainted with usury is indorsed to a third person, who purchases it for value, and without any notice of the illegality attending the execution thereof, and the maker gave to the payee a mortgage to secure the payment of said note: *Held*, that the defense of usury could not avail the maker, and that the mortgage given to secure the payment of the principal and interest due thereon could be enforced: *Coor vs. Spicer*, 65 N. C., 401.

See EVIDENCE, 8; MORTGAGE, 3, 4.

### VENDOR AND PURCHASER.

1. The vendor's lien upon land is retained as well when a conveyance is made as when only a bond for title is given, and it is not necessary to exhaust legal remedies before resorting to its enforcement. The lien follows the consideration, unless an intention to interrupt it is shown: *Campbell vs. Roach*, 45 Ala., 667.

2. A purchaser of land can not resist the enforcement of his vendor's lien on the ground of his bond for titles not being stamped, and the inchoate right of dower of the vendor's wife, where the vendor offers to convey a perfect title, which the court requires to be done before the sale shall take place: *Watson vs. Bell*, 45 Ala., 452.

3. A vendor's lien upon land for its purchase money is not impaired because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount

to be paid for the land can be ascertained by proof: *Russel vs. McCormick*, 45 Ala., 587.

See EVIDENCE, 4.

WAIVER.—See ACTION, 5; BILLS AND NOTES, 9; INSURANCE, 2; LIEN, 4; TENDER, 1.

#### WILL.

Where a widow elected to take under a will, giving her one-third of the real estate of her husband in lieu of dower, in consideration that all of the heirs should agree to give her one-third of the personality in addition, and only a part of the heirs consented to the agreement, it was *held*, that the widow was not estopped from afterward relinquishing all rights conferred by the will and claiming her right of dower: *Richart vs. Richart*, 30 Iowa, 464.

WITNESS.—See EVIDENCE, 4.

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*RECENT AMERICAN DECISIONS.*

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*SUPREME COURT OF TENNESSEE.*

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[DECEMBER TERM, 1872.]

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*J. W. S. FRIERSON and J. B. FRIERSON, Executors of W. E. KENNEDY vs. PRESBYTERIAN CHURCH in the UNITED STATES, et al.*

By FREEMAN, J.—This bill is filed by the executors of Wm. E. Kennedy, for a construction of certain clauses of his will, and direction of the Court of Chancery in performance of their duties, and execution of the trusts of the will.

It appears from the record that the testator died 17th of March, 1863, in the county of Maury, at an advanced age, having before this, emancipated the larger portion of his slaves, sending them to Liberia, through the agency of the American Colonization Society. He left no children, and disposed of a considerable share of his estate to his collateral relations by various clauses of his will. First directing by item. 2nd, “that all his estate, both real and personal, not otherwise disposed of, wherever situated, be sold by his executors, and converted into money. He proceeds in ninth and tenth clauses as follows: “All the residue of my estate, of whatever kind, whether real or personal, or mixed, left after carrying out the foregoing provisions of this will, (and if any legacy, I have given, or fund, appropriated in this will, can not, for any cause whatever, take effect or be appropriated as herein directed, the same shall constitute a part of said residuum, and be subject to the disposition of this clause,) I give to my executors, to be appropriated by them as follows: One thousand dollars to the proper authorities of the Union Theological Seminary, at Prince Edward Court House, Virginia; one thousand dollars to the Rev. W. McLane and Rev. R. R. Gurley, Secretaries of the American Colonization Society in Washington City, D. C., and their successors, to be by them held and used in promoting the objects, purposes and enterprises of said society in

colonizing negroes in Liberia, Africa ; five hundred dollars to the General Assembly of the Presbyterian Church of the Confederate States of America, or of the General Assembly of the Presbyterian Church South, whatever may be its precise title, for the benefit of such Bible society as has been, or may be established by said General Assembly; and five hundred dollars to said General Assembly for the benefit of such tract society as has been or may be established by said Assembly ; and if no such society should be established by said church, or be in existence under its control, then said sums severally to be used by said General Assembly of the Presbyterian Church in the Confederate States of America, for the promotion and advancement of the Bible and tract cause, respectively, in such manner as to said Assembly may seem best for the advancement of said objects. I then desire two-thirds of the remainder of the residuum to go to said General Assembly of the Presbyterian Church in the Confederate States of America, for the benefit of Domestic Missions, and to be used by said Assembly through its proper board or committee already, or to be appointed, or such agency as it may deem best for the promotion and advancement of the cause of Domestic Missions. One-half of the remaining third of said balance to go to said General Assembly of the Presbyterian Church in the Confederate States of America, to be by said Assembly appropriated through its boards, committee or other agency under its control, to the uses, purposes and benefits of Foreign Missions ; the remaining half of said third to go in like manner to the said General Assembly of the Presbyterian Church in the Confederate States of America, for the benefit of the Board of Education and Publication, in equal proportions; and if said church should have no such boards or committees for these objects, then through such agencies as such church may establish and control to carry out and promote such objects. When I use the term General Assembly of the Presbyterian Church in the Confederate States of America, or General Assembly of the Presbyterian Church South, I mean to be understood as referring to the "Old School Presbyterian Church in the South ;" and should any part thereof re-unite with the Northern Church—I mean the part which shall remain as a separate body in the South. I desire said General Assembly, through its proper boards, committee or agencies, in its dispositions of the funds herein set apart to Domestic Missions to select in one of the four tribes of



Indians, viz: The Choctaws, Chickasaws, Cherokees, or Creeks, four male and four female youths, and to appropriate of the said funds the sum of one thousand dollars for the education of said Indian youth.

Item the 10th. In the event that any of the legacies or sums directed to be given to any of the benevolent objects specified in the 9th item of this will, should fail on account of a want of proper description, or for *any other reason*, then I give the same to my executors, with the hope and belief that, as they know the objects and purposes I have in view in making these bequests, they will carry them out in such manner as will approximate as nearly as possible, to my wishes herein expressed. I have declared it to be my wish and desire that I should not be considered as dying intestate as to any part of my estate. What I have already done for, and given to my relations, together with the bequests in this will, is as much of my estate as I wish them ever to have; and should it so happen that any portion of what I have given to charitable and benevolent objects and societies in this will should fail, or not vest as I have herein desired and directed, *I do not intend* the same, or any part thereof, to go to my kindred, or any of them, *but* to my executors, to be paid over to such charities as may be declared valid and legal, in the proportion herein set forth; and if all of said charitable bequests should be declared illegal and void, so as not to vest, *then the whole to my executors, in their own right, trusting*, nevertheless, and believing that under a proper sense of their obligation to *their own consciences and accountability to God*, they will, as nearly as they possibly can, in conformity with what I have herein indicated, *pay over and contribute* the same to charitable objects and purposes. In other words, I trust that, should these charities fail as herein set forth, they will do for me, when I am dead, what I have attempted to do in this, my will." He then concludes by appointing his friends, the present complainants, and George Lipscomb, the executors of his will, the latter of whom renounced, the other two qualifying and taking upon themselves the duties of its execution.

The defendant heirs and distributees a portion of them, answer and claim that these clauses of the will, nine and ten, are of no validity, because at the date of the will no such corporation was in existence as therein named, capable in law or equity, of taking the bequests, and because such bequests are in themselves contrary to the policy of the State, and not to be encouraged. The others answer and insist that the bequests are illegal and void, because of want of capacity in

donees to take, being as claimed, merely voluntary associations, not incorporated, and because the charities are not definite in their objects, or lawful in their creation, and no trustees appointed to execute the trusts; and therefore that the testator died intestate as to this part of his estate, and the same should be distributed by executors, under statute of distributions. The Presbyterian church in the United States, answer, and claim the bequests, asserting that it was an incorporated body, at the time the will was made and took effect, presenting an act of incorporation passed by the Legislature of the State of Tennessee, passed March 19th, 1862, and accepted by the General Assembly of the Church, August, 1863, incorporating the General Assembly of the Presbyterian Church in the Confederate States of America, which, if valid as a law of the land, and not unconstitutional, confers on the body incorporated the right to take and hold property devised to them. The answer then gives the history of the change of name of the General Assembly of the Presbyterian Church in Confederate States, to General Assembly of Presbyterian Church in United States, showing that the latter is the same body under a different name, and that this body is the same as designated in the will as "Presbyterian Church South," and then show that the executive committees, upon the subject of "Domestic Missions, Foreign Missions, publication and education, were a part of the organization of the General Assembly before its incorporation, and that such agencies continue substantially to exist to the present time. The answer therefore insists on the validity of the bequests in favor of this church, and that they be enforced in favor of the Presbyterian church in the United States, as now existent.

We need not give the details as to date and history of the changes of name of this body, as we think the main question is, as to whether the bequests vested in a party capable of taking at the death of the testator, and subsequent changes of name in the corporate body, could not defeat the right vested, the body itself remaining substantially the same legal person: See 1st Swan, 368.

Assuming for the present that the act of incorporation passed by the Legislature of the State of Tennessee was and is a valid act of incorporation, the question presented is, are the bequests in the 9th item of the will valid charities under the now well defined rules of law on this subject in this State?

We are relieved from the investigation of the grounds on which this jurisdiction to enforce a charity rests in our State, by the learned

and exhaustive opinions of Judge Turley in the case of *Green vs. Allen*, 5th Hum., 177, and of Judge Green in the case of *Dickson vs. Montgomery*, 1st Swan, in which this question is discussed with the ability and research characteristic of those able judges. It may be considered as settled now in this State, and we believe in most of the States of the Union, that the jurisdiction rests mainly if not entirely on the ordinary powers of our Courts of Chancery exercised in the administration and enforcement of trusts, the same character of jurisdiction exercised by the Court of Chancery in England, as part of what is known as its extraordinary jurisdiction, that is, simply as a Court of Equity as contradistinguished from its ordinary or common law jurisdiction, and the delegated powers of the Court of Chancery, which are exercised by the Chancellor representing the King, as *Faren Patrias*, and as part of the Prerogative of the Crown: See *Green vs. Allen*, 5th Hum., 198; *Owens vs. Missionary Society of Methodist Church*, 14 N. Y., 387, 388; *Beekman vs. Bonner*, 23 N. Y., 298; *Dickson vs. Montgomery*, 1 Swan, 366.

The principles settled by our decisions are "that where the charity is definite in its objects, is lawful, and is to be executed and regulated by trustees, who are appointed for the purpose, it will be upheld," or, in the language of the 4th proposition of Judge Green, in the case in 1st Swan, p. 367: "If the fund be vested in a trustee, to be managed and controlled by him for a lawful, definite and charitable use, the gift will be valid, though there be no person in being capable of suing for the enforcement of the trust." This last case was a bequest to the "Treasurer of Clarke and Erskine College, and his successors in office in trust, first, for the endowment of the college; second, for the benefit of Home Missions; third, for the benefit of Foreign Missions; fourth, for the education of indigent young men preparing for the Gospel ministry, in 'Associate Reformed Church,' and the sums given for the last three objects were to be applied under the direction of the Associate Reformed Synod of the South." These bequests were upheld, on the ground that the "Associate Reformed Synod" was an incorporated body, and "might sue for and recover this fund, to be held by them, as their other funds were held, subject to the control of the Synod," 369; and that the bequests for "Home Missions and Foreign Missions were not void as being too indefinite, but that it was of the very nature of a charity that the individual beneficiaries of the charity are unknown." The gift for such purpose, says Judge Green, is of the nature of a power of ap-

pointment, and being controlled by trustees, and the objects definite, is valid."

Applying these principles to the bequests in the 9th item of this will, we hold that the bequests are valid, as gifts to a charity, assuming, as we have done, that the General Assembly of the Presbyterian Church South, or by either name as designated in the will, was at the time when the will took effect—that is, at the death of the testator—an incorporated body, capable of taking and holding property. It is given to the "General Assembly of the Presbyterian Church of the Confederate States of America," or of the "Presbyterian Church South," whatever may be its precise title, "for the benefit of such Bible Society as has been or may be established or organized by said General Assembly, and for the benefit of the Tract Society; and if no such societies should be established or in existence, then to be applied by the General Assembly for the promotion and advancement of the Bible and Tract cause respectively, in such manner as to such Assembly may seem best for the advancement of said objects." Here the party to take and hold, and administer the fund, is clear, definite and certain. It is the General Assembly of the Presbyterian Church above mentioned. This body or legal person is to take and receive the money from his executors, and is to appropriate and use it for the objects and purposes specified, that is, the promotion of the "Bible and Tract cause"—language well understood among and by all who are familiar with the operations of the various bodies representing the Christian denominations of our country. The purpose is well defined by such language to be, to aid in the printing and circulation of Bibles among the destitute portions of our population, and of religious tracts among all, as may be deemed best and proper for the dissemination of what is held to be religious truth by the denominations engaged in this department of religious effort. The other trusts in favor of Foreign and Domestic Missions are equally well defined by terms equally well understood, it being well known that Domestic Missions refers to missionary effort among the destitute portions of our own country, while Foreign Missions designates that peculiar department of christian effort for the propagation of christianity, in which the various denominations of christians have been engaged, especially since about the beginning of the present century, in what is known as foreign lands, mainly confined to heathen countries, but not entirely.

The Chancellor held these charities valid on the ground that

the executors were the trustees; but in this view of the case we think he erred, as in the language of Judge Turley, in the case of *Green vs. Allen*, they are directed to pay the fund to the General Assembly of the Presbyterian Church, and have it given to them only for that purpose, or rather placed in their hands by the testator, simply charged with the duty of payment to this body, and have, under the 9th clause, nothing further to do with the fund, the administration of the charity not being confided to them, by this clause, but to the General Assembly of the Presbyterian Church.

We come now to the question, of whether the Act of the General Assembly of the State of Tennessee incorporating the Presbyterian Church is valid, or is unconstitutional and void, for any cause whatever. It is insisted for distributees that the act of incorporation is void, because claimed to have been passed by the General Assembly of the State, assembled at Memphis, Tennessee, and not at Nashville, the capital, and that the Legislature was not a legal one.

By section 2d of Schedule of Constitution of 1834, it is provided "The General Assembly which shall sit after the first apportionment of representation under the new Constitution, to-wit: in the year one thousand eight hundred and forty-three, shall, within the first week after the commencement of the session, designate and fix the seat of government, and when so fixed, it shall not be removed except by consent of two-thirds of the members of both Houses of the General Assembly." The Legislature did, in pursuance of this section, declare as substantially adopted with the Code, that, "The town of Nashville, in the county of Davidson, is the seat of the State Government of this State;" and now it is insisted, that if the General Assembly met at any other place, while Nashville remained the seat of Government, laws passed by them are void.

We may say first, in reference to the fact that the law was passed at Memphis, that there is nothing on the face of the law from which we can see that it was not passed at Nashville; but, assuming, as perhaps we are bound to do, that we judicially know such to have been the case, then the question suggested is fairly presented, and we feel bound to decide it. The section of the Schedule quoted, only requires the Legislature to designate and fix the seat of Government, and when so fixed, it shall not be removed except by consent of two-thirds of both Houses of the General Assembly.

The fair construction of this clause is, that the permanent seat of

Government shall be fixed; but it certainly does not follow, that upon an over-riding and controlling emergency, the Legislature, one branch of the Government only, may not assemble at another place, temporarily, while that emergency lasts, without changing the permanent seat of government, nor, that a change of the permanent seat of the government is absolutely necessary in order to such a temporary assemblage, in such an emergency as indicated.

Again, nothing else appearing to the contrary, the presumption, which must always stand till removed by clear evidence to the contrary, would be in favor of the regularity of the action of the law making power in the State, and we would be bound perhaps, to assume that the change of place of meeting had been assented to as required by law, or that the seat of government had been changed by a two-thirds vote of both Houses of the General Assembly as required.

On looking into the legislative action of this period, however, we find, that in contemplation of such an emergency as did occur, a joint resolution was passed by both Houses of the General Assembly, on 10th of February, 1862, authorizing a temporary change of seat of government, and authorizing the Governor, by proclamation to convene the Legislature when he deemed it necessary, at the place determined upon as the temporary seat of government: See Acts of 34th General Assembly for 1861 and 1862, pamphlet, p. 82. We may presume, if we did not know judicially, as part of the public and well known history of the country, that the Legislature did meet in pursuance of this joint resolution, and while in such session, the law incorporating the Presbyterian General Assembly, was passed.

Another question presents itself in reference to the validity of the law passed by the Legislature of 1862. As a matter of history, we know the country was then engaged in the late civil war. Tennessee was one party to that strife by the action of her people, and recognized and declared to sustain the enemy relation to the United States, by the well known proclamations of the President of the United States, made in pursuance of a law of Congress. By the Schedule to the amendments to the Constitution of 1865, of the State, it was declared that all laws and ordinances passed from and after the 6th of May, 1861, were null and void, we suppose, on the ground either of the opinions held by the members of the Legislature on the questions between the parties to the war, or the fact



that the State was then in rebellion against the United States, and perhaps on the theory that the members of that Legislature were engaged in acts of treason, or were themselves traitors.

This ordinance was abrogated by section 1st, article 11 of the Constitution of 1870, thus leaving the validity of such laws as were passed by the Legislature during the period of the war, to be tested on general principles applicable to the laws passed by legislative bodies, under our system of written Constitutions, which are the tests of validity of all legislation.

We need only say with reference to the theory, that all acts passed by the Legislatures of States during the existence of the war, which were engaged in the rebellion against the United States, were void, is one which, as far as we can see, is based on no principle or sound reason, either of general law or growing out of the peculiarities of our Constitutional system of government; and the schedule of the Constitution of 1865, on this subject, was a purely arbitrary declaration of the will of the body which promulgated it. It must be sustained upon the idea that a State of this Union is only such, and can and does only exercise its powers as such—in a word, have a legal or Constitutional existence, by virtue of its relation to and connection with the Federal Government, as one of its integral parts. In this is forgotten the principle that underlies our entire theory of government, both State and Federal, as seen in the Constitution of the United States on almost every page, that the States composing our Federal Union are well defined entities, constitutional organizations, having a life independent of their connection with the Federal Union, and not dependent upon their connection for such existence. This principle is distinctly recognized in the preamble to the Constitution of the United States: "We, the people of the United States, in order to form a more perfect Union," &c., the Union of the States having been found imperfect under the old articles of confederation. We need not enumerate the various clauses of the Constitution of the United States in which the principle is recognized. We need but refer to section 10 of article 1st, containing prohibitions upon the powers of the States, among others, that "No State shall enter into any treaty, alliance or confederation; make anything but gold and silver a legal tender; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; no State shall, without consent of Congress, lay any imports, duties, &c., &c." And then to the 10th article of Amendments to the Constitution: "The powers not dele-



gated to the United States by the Constitution, nor prohibited by to the States, are reserved to the States respectively, or to the people."

It will be seen from these clauses of the Constitution, that the States are referred to in section 10, article 1st, distinctly in connection with acts of government, that the legislative or law making power of these States is distinctly recognized as existent, by the Constitution of the United States, and certain well defined limitations placed upon its action. And upon sound principles of construction, the law making powers or legislative bodies of the States, could well have exercised all legislative powers, and done all things deemed proper by such bodies, so far as the Federal Government was concerned, not prohibited by the Constitution of the United States without the provision in article 10 of Amendments. But that article of the amendments distinctly lays down the principle that "The powers not delegated to the United States, nor prohibited, are reserved to the States respectively, or the people." It will be seen from these clauses that governmental powers are alluded to, powers to be exercised by governments—organized governments—having independent spheres of action that is within the limits of the territory to which they belong; and acting in these spheres not by virtue of their relation to, or connection with, the United States Government, but by virtue of their own inherent vitality, or, more properly, in accordance with the American idea of a government, by virtue of powers derived from the people, by which they were created, and from which they receive their existence. Such organized State Governments, with all legislative powers, not prohibited by the Constitution of the United States, are thus clearly recognized by that instrument. These governments are not affected in the exercise of their powers, in any way, by the Federal Government, except by the grants and prohibitions of the Federal Constitution, and as their existence as State Governments is not derived from the Federal Government, nor do they grow out of, or spring from this Government, nor out of any relation borne by these State Governments to the Federal Government. The fact that the relation which a State of the Union bears to this Federal Government is not thus derived, shows clearly that within its sphere of action, we must look to other and different tests as to the validity of its laws, than the simple one of connection with the United States. In fact, the relation of the State Governments to the United States, except in reference to the grants of power to the United States, and

the prohibition upon the power of the States, has no bearing whatever upon the question of what powers may be exercised by the State Legislatures, nor does such relation, except as indicated, in any way affect or modify the action of the State Legislatures in reference to all matters within their sphere of action. We might refer to the series of unquestioned decisions of the Supreme Court of the United States, holding that the prohibitions of the amendments to the Constitution, as that no one shall be subject for the same offense to be twice put in jeopardy of life and limb, &c., have no application to the States, but only to the Government of the United States--the States being left to protect themselves from oppression by the provisions of their own State Constitutions. See cases, *Bowen vs. City of Baltimore*, 7th Pet. R., and other cases.

It follows, necessarily, that the fact that the normal relations of the State of Tennessee to the United States were temporarily suspended during the war, could not have the effect to render void an Act of her Legislature upon a question no wise connected with the Federal Government, but one of purely local interest; the power to legislate upon such question not being derived from the Federal Government, nor prohibited to be exercised in the Federal Constitution by the States.

The principles which we have announced are abundantly sustained by the decisions of the Supreme Court of the United States. We only cite the language of the court in *Lane County vs. Oregon*, 7 Wal., as follows: "The people of the United States constitute one nation, under one government, and this government within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States, disunited, might continue to exist; without the States in Union, there could be no such political body as the United States. In many articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers not expressly delegated to the national government are reserved." While we may be permitted to say that we do not think the use of the term "nation," in the above extract, appropriate to our Federal Government, yet, the

principle laid down sustains the views we have above presented as to the nature of the State governments.

In the case of *Texas vs. White*, 7 Wal., 733, the court, by Chief Justice Chase, lay down the following upon the direct question of the validity of State legislation during the war, by a State engaged in the rebellion—the State of Texas. He says, “It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example as sanctioning and protecting marriage, and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to persons and estates, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government; and that acts in furtherance of a support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must be regarded as invalid and void.” While we do not think this extract strictly accurate in its theory, nor is it assumed by the learned Chief Justice to be so in its details as a definition of powers of State governments, yet it involves the principle on which such an act as is now under consideration is clearly maintainable, and in this respect is sufficient for our purposes. We would prefer to vest the validity of the act upon the broader ground, that all acts of a State Legislature are to be declared valid, or the contrary, as being in accordance with, or in violation of, either the Constitution of the United States, or of the Constitution of the State. We know of no other test of the validity of a legislative enactment in our American system than this. These constitutions are the supreme law of the land. Legislative enactments are to be tested by them, and by them alone.

We need not further discuss this question. It follows, that the act of incorporation of the General Assembly of the Presbyterian Church, whatever be its name, is valid, and conferred upon the body the corporate powers contained in the act of incorporation, and this body was competent to take and hold the bequests given in the will, as trustee for the charities therein designated.

We may say in reference to the argument that there are no bene-

ficiaries designated who can enforce the trust, that, in the language of Judge Green, in the case of *Dickson et als. vs. Montgomery et als.*, 1 Swan, 369: "It is of the very nature of a charity that the individual beneficiaries are unknown;" and in addition to this, an action is given, and remedy provided, in the name of the State, by sections 3409, 3410 of the Code, "to bring the directors, managers and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of property entrusted to their care; and to remove such officers or trustees on proof of misconduct, and generally to compel a faithful performance of their duties."

As to the objection that the bequests are to "superstitious uses," and therefore void, we need but say, that no such objection lies to the will, nor could be maintained in a christian country. Indeed, it may be seriously doubted, whether in the United States, where no discrimination is made either in law or by the theory of our government, between the professors of any particular religious creed, or members of any religious organization, any such thing as a "superstitious use" can be said to exist. It has been so held in Pennsylvania and Kentucky: See 1 Watts, 218; 2 Dana, 170.

In this view of the case, we need not discuss the questions raised and presented in the tenth item, as to the trusts sought to be imposed on the executors by the precatory words of said clause. We need only say, that without going into an examination of the authorities on that question, we incline to the opinion that under the words of that clause, giving the property to the executors "in their own right, trusting nevertheless and believing that under a proper sense of their obligation to *their own* consciences, and their accountability to God, they will, as near as they possibly can, in conformity with what I have herein indicated, pay over and *contribute* the same to charitable objects and purposes;" and taking the whole clause together, that no trust enforceable in a court of equity is created, but that the testator intended to leave this trust to be enforced alone in *foro conscientia*, and not by the civil tribunals of the country. This is indicated with considerable clearness by the use of the word "contribute," a word very generally used and understood in connection with payments made to our various religious organizations, to express the idea of a voluntary gift in aid of the purposes of such institutions.

We may add, that in any event, the kindred of the testator in this

case could have no interest in this fund, as they are by the most unequivocal language, excluded from further participation in his estate. And if the bequests to the charities had failed, the executors would unquestionably have taken the property in "their own right," by the terms of the will, to the exclusion of the distributees. The testator clearly had the right to make them the objects of his bounty, and to take it from them, and give it to his kindred, who are by express language of the will excluded from all participation in it, would not be to execute a will, but to make one, or rather would be to hold that the testator had no power to give his property to whatever person he might choose, a right clearly given under our law.

We therefore hold, that the bequests to the General Assembly are valid, and the executors are bound to pay over the funds to that body. The decree of the Chancellor will be affirmed, so far as it conforms to the views of this opinion, the result of this opinion being the same as arrived at by his decree.

The case will be remanded to the Chancery Court for settlement of the estate, and disposition of other matters involved in the trusts imposed on the executors by other portions of the will.

The costs of this court will be paid, and of the court below, and the future proceedings, out of the funds.

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MARY HARRISON vs. HENDERSON, Executor, &c.

By FREEMAN, J.—The statute of limitations of two and six years, is insisted on in bar of the whole claim. As the question is directly presented in the case, we will proceed to its decision, as far as its application might be made to the note of \$331.

In case of *Gridner vs. Stephens*, 1st Heiskell Reports, in the opinion by Judge SHIELDS, it was very decidedly maintained that the effect of the war, and closing of our courts of general jurisdiction, had no influence at all on the running of these statutes, and would not prevent their operating as a bar to claims existent at the time this state of things commenced, as we shall see in this discussion. The question was not authoritatively decided in that case; and its

decision expressly waived. We think the real question presented on the facts, is not whether the convention or Legislature could revive or reinstate a right once certainly barred or extinguished by operation of the statutes, but whether the suspension and closing our courts, and cessation practically of all civil remedy for enforcement of legal rights did not, of itself, operate to stop the running of the statute; or in other words, that the statute was not by its fair terms and meaning, applicable to such state of things, and therefore not operative at all, while this state of things lasted. We turn to the Code, sec. 2769, and find the language of the general statute of limitations, as to personal actions, to be as follows: "All civil actions, &c., *shall* be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise provided." The following sections fix the periods in which "*actions*" *shall be* commenced, in particular cases, the language of each section being, "actions shall be commenced" within the period therein prescribed. The sections applicable to administrators and personal representatives, are 2279, 2280, and are as follows: "The creditors of deceased persons, if they reside in the State, shall, within two years, and if without, shall within three years from the qualification of the executor or administrator, exhibit to them their accounts, debts or claims, and make demands, and *bring suit* for the recovery thereof, or be forever barred in law or equity." But if any creditor, after making demand of his debt or claim, *delay* to bring suit for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said periods of limitation.

What, from the language of these statutes, and from their objects and purposes—their spirit—to be gathered from these two sources, was the real intention of the Legislature, and what the principle on which they rest? They all provide a period in which actions shall be commenced. Does not the fair and natural exposition of this language involve the idea that the party whose right is to be affected, shall be able to bring or commence an action? In other words, the requirement, that civil actions shall be commenced within a certain period, necessarily, by the force of the language, implies that, during the period mentioned, and before it has expired, that they may be commenced; and can it be fairly maintained that the Legislature, when it required an action to be commenced on a note within six years, meant thereby that the bar should be operative as



well, where no courts were open in which an action could be commenced, as where such courts were open, and a party could commence and enforce his remedy on his cause of action? We can not so conclude, unless we assume that the Legislature intended to require a party to sue in six years or lose his debt, and at the same time intended that, even though he could not sue, he should equally lose it. Suppose the state of things which has occurred had been anticipated by the Legislature, and the case had been put to that body, can any man believe that they would not have said this enactment can have no application in such case, as we only mean to bar his remedy for the repose of society, upon grounds of public policy, after he has been first furnished with ample remedy, and ample time in which it might be enforced? Again, suppose it had been proposed to enact a statute of limitation which should bar a remedy, or right of action, which was unknown to our law, or not in general use, would not this very enactment amount to a strong implied recognition of such remedy as existent, and one to which a party was entitled by the Legislature? Then, surely it seems that the enactment of a period beyond which an action should not be brought, clearly involves the idea that the statute was only intended to be operative when such a state of things existed, that within that period, an action might be brought and prosecuted. We hold, therefore, that the construction of these statutes is, that they are only applicable to the normal state of things, when the machinery of Government is regularly organized, and remedies are furnished to parties for enforcement of rights, through courts of justice, in language of 17th sec. of Bill of Rights of our Constitution, when "all courts shall be open; and any man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law." In fact, this clause of the Constitution indicates distinctly what was the normal state, or established condition of things under which these statutes were enacted, and intended to operate. This instrument is the basis of the Government, is its Constitution under which the Legislature existed which passed these laws. They were passed while this clause of the Constitution was a living, practical, operative provision, and in view of the fact that this state of things, ordained and established by the supreme law of the State, was not only in actual operation, and its courts open, but were expected to be at all times open, and every man furnished, in fact, with a remedy by due course of law, for the enforcement of all legal rights guaranteed to him. In view



of this clause of the Constitution of our State, and the clause of the Constitution of the United States, sec. 10, art. 1st, prohibiting any State from passing any law impairing the obligation of contracts, "we think that if a law had been passed by the Legislature which had enacted, in so many words, that a man's right to recover his debt due on a contract should be barred in six years, or any other period, notwithstanding there were no courts in operation, or open in which he could bring his suit, such law would have been declared void as violative of the provision that courts should be open, and every man entitled to his remedy by due course of law" for injury done him in his lands, goods, person or reputation, and that unless the court were open, the Legislature could not deprive him of his right. It would have also been held void as impairing the obligation of contracts—their legal obligation—which must necessarily consist in an efficient remedy for their enforcement, as we lately held at Knoxville on this question, that the moral obligation of the contract was one thing, enforced in form of conscience alone; but its legal obligation was in its essence, the *legal* obligation that rested on the party by which it was to be enforced by the law; and this legal obligation, or compulsion could not be impaired; and therefore held the stay law of 12 months, of the act of 1861, to be void as in violation of the constitutional inhibition. We seriously doubt whether any lawyer will maintain that the Legislature could, by direct enactment, embodying in terms the principle maintained, though not decided in case of *Gridner vs. Stephens*, 1 Heis., 280, have constitutionally passed such a law; and that if so enacted, it could not have been void. If this be true, much more, must it be held that they have not done so, when on the face of the statutes no such result was intended; on the contrary, the very opposite fairly implied on this question. We cite from Cooley on Const. Lim., page 364, the following, as embodying the sound principle on which statutes of limitation rest. He says as to limitation laws, which sometimes result in depriving a person altogether of his property, and yet are in strict conformity with the law of the land, and quite unobjectionable in principle. "A limitation law, he says, fixes upon a reasonable time within which a party is allowed to bring suit to recover his rights; and if he *fails* to do so, establishes a legal presumption against him that he has no right in the premises. It is a statute of repose. Every Government is bound in good faith, to furnish its citizens all needful legal reme-

dies; but it is not bound to keep its courts open indefinitely for one who neglects, or refuses to apply for redress until it may be fairly presumed that the means by which the other party might disprove the claim, are lost in the lapse of time." He adds, on p. 365: "All limitation laws, however, must proceed upon the idea that the party, by lapse of time, and omissions on his part, has forfeited his right to assert his title in the law." These principles are well sustained by decisions of our courts, and will not be questioned.

If the principle then be correct, that the government is bound to furnish all needful remedies to its citizens, and limitation laws are based on the idea that the party so furnished with his remedies has, by neglect and omissions on his part to bring his suit and take advantage of these remedies, forfeited his right to them, then it is inevitably the same that if no such remedy is within his reach, the government in a state of revolution, so far overturned that no remedy is furnished, no neglect can be imputed, no omission charged; and therefore no forfeiture can be enforced, or insisted on as having been incurred, based on any sound principle, but to enforce such forfeiture, would be purely arbitrary, and a violation of every principle of justice, as well as subversive and destructive of the obligation of the contracts of parties.

We cheerfully concede the principle laid down in *Gridner vs. Stephens*, 1 Heis., 285, that "a statute, retrospective in its character, and operative, directly affecting and divesting vested rights, is very generally considered in this country, as founded on unconstitutional principles, and inoperative and void." But we think this principle has no application to the case now in hand, because we do not think the right to the defense of the statute of limitation has ever accrued to a party, where it must be made out, by counting a lapse of time, in which no courts were open in which he might commence his action. On looking at the case of *Gridner vs. Stephens*, 1 Heis., 289, we find that the precise question here presented as to the effect of the civil war, and closing of the courts, was not decided, the learned Judge who delivered that opinion remarking in conclusion of it: "we do not feel ourselves called on to decide this question at present, as it does not appear in this record that the courts were closed against the institution of process in the years 1861 and 1862; and this could not appear in fact, as we judicially know such was not the case." He evidently inclined to the opinion, however, that the statute would run

notwithstanding the closing of the courts; and while no Judge's opinion could be entitled to more weight than the writer of that opinion, we feel compelled to differ from him in this view of the question.

In this connection, it may be proper to refer to the quotation from *Cooly on Limitations*, cited by Judge Shields, in his opinion in 1 Heis., 286, as to having a vested right in a defense. It is as follows: "As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand can not have it revived against him; and he who has become released from a demand by the operation of the statute of limitation, is equally protected. In both cases the right is gone; to restore it would be to create a new contract for the parties—a thing beyond the power of legislation:" *Cooly*, 369. No cases are cited as holding this precise doctrine, by Judge *Cooly*, but assuming the principle to be correct; yet from reference to the previous principle laid down by the learned author in discussion of this very question of statute of limitation, he lays down the rule in exact accord with the view we have herein maintained. After saying, as quoted in the previous part of this opinion, that all limitation laws, however, must proceed upon the idea that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law," he proceeds on next page, 366, to add another qualification to the doctrine announced on the previous page, as to vesting of title to property by virtue of the statute of limitation being a right beyond the power of the Legislature to defeat. It is as follows: "All statutes of limitation, also, must proceed on the idea that the party has had opportunity to try his right in the courts,—a statute which should bar the existing right of claimants without affording this opportunity, after the time when the statute should take effect, would not be a statute of limitation, but an unlawful attempt to extinguish rights, whatever it might purport to be by its terms."

If this principle be sound, then as we have assumed, had the Legislature enacted by terms of the law, that all rights existent at the commencement of our civil war should be barred in six years, notwithstanding no courts were open in which the party could enforce his claim; or in two years and six months against all parties who had claims against estates of deceased persons, on which administration had been granted, such a law would have been void, as an attempt to extinguish rights by arbitrary legislative enactments.

Yet, if we are to construe our statutes of limitation as being operative in such state of things, we are confident by so doing, to reach a result by construction of the statutes which could not have been attained or effected had the Legislature so written the law on its face. We can not see how this conclusion can be avoided, nor how such a doctrine can be maintained, as a fair application of the principle underlying all statutes of limitation.

There are numerous maxims of the law that furnish a sound basis for analogous reasoning in favor of the view we have taken. It is a maxim that "that which is without remedy avails of itself, if there be no fault in the party seeking to enforce it;" or as it is put by Lord Bacon, "that when to preserve the principle and grounds of the law, it deprives a man of his remedy, without his own fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law—sometimes a more beneficial remedy:" Broom's Leg. Maxims, pp. 148, 149.

The familiar cases of retainer by personal representative in satisfaction of a debt due him from deceased, and the common law doctrines of remittier, are referred to as illustrations of this maxim. The principle being, however, simply, that where a party is deprived of the means of enforcing his rights by the law, he shall not be deprived of it by reason of such disability. It is true the maxim is applied to cases where the law disabled a party from bringing his suit; but we think it an equally sound application of the principle, when, by the action of the State government, all the machinery of the law is for the time being overturned, and the law itself existed in but a state of suspended animation, if it was not silent altogether, illustrating the maxim practically, that in the midst of arms the law is silent. Its voice was hushed, or ceased to be heard in the midst of the confusion of that eventful strife, we all know. Another maxim serving to strengthen by analogy the view we have presented, is, "the law does not seek to compel a man to do that which he can not possibly perform:" Broom's Leg. Max., p. 167, or as the principle is stated on p. 168, where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general, excuse him. We might cite many of the rules of law that have ripened into maxims—principles, so long and well established, as to need no authority to sustain them in support

of the reasoning of this opinion. The principle we have maintained on this question is the same which has been adopted by this court, and all the courts of the United States, both State and Federal, so far as we have seen, on the question of interest accruing during the war, on debts due citizens of one belligerent to citizens of the other. It has been uniformly held, that interest could not be collected, and this on the plain principle that the debtor, by the result of the war, could not pay, nor the creditor sue to compel him to perform his contract: See 9 Wal., 687; *Jackson Insurance Company vs. Stewart*, A. L. R., 732, vol. 6; *Hanger vs. Abbott*, 6 Wal., 532.

Yet our statute is clear and imperative, "that *all* bills, bonds, notes, bills of exchange, and liquidated and settled accounts, signed by the debtor, *shall* bear interest from the time they become due, unless it is expressed that interest is not to accrue until a specific time therein mentioned. We have, as before stated, however, held unanimously, in accordance with a uniform current of authorities, that interest did not accrue, and that such paper did not bear interest, notwithstanding the statute says it shall bear interest; and this not on the ground that this was an exception to the statute, but on the plain ground that it was not intended to apply to such a case, and that the intention and purpose of the law was the law, and not simply its literal words.

We might further illustrate and strengthen this view, as we think, by agreement and authority, but we forbear. We only look for a moment at the hardships and injustice of adopting an opposite rule. This case will serve to illustrate them. The note was due January 1859. It was on his father-in-law, who soon after died. The war commenced—all civil business ceases—no courts are open. The party can not sue his administrator, the administrator can not sue others who may owe the estate, and collect the assets, the matter goes on till the two years expire. If he then sues, the administrator is bound to plead the statute, and his debt is lost. If the administrator pays the debt, he is guilty of a *devastavit*, and must pay it to the distributees or legatees. In any view of this question, we think the ends of justice will be best subserved by holding that from the time the courts were closed, no statute of limitation shall be operative. As a matter of course, where the bar of the statute was complete, before the courts ceased to be kept open and business done in them, we hold that it will be effective. But before this, that is the bar completed by operation of statute, with courts open in which suits might be

commenced. The Legislature or Convention might provide, as was done, that the time from the 6th of May, 1861, should not be counted, and thus leave the party where he was when he ceased to have the means of enforcing his claim. And during such closing of the courts, the statutes did not run, the party not being in default for not bringing his suit, no courts being open in which it could be brought, or prosecuted if brought.

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NOTE.—This was a case which involved both the construction of a will, and the operation and effect of the war upon the statute of limitations. The first part of the opinion of the court, upon the construction of the will, we omit. As to the second, we give the opinion of the court in full.

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## SUPREME COURT OF PENNSYLVANIA.

[MARCH 23, 1872.]

*BUSH vs. STOWELL.*

1. *Statute of Limitations when a bar to an action on a note due by installments.*
2. *Effect of action of debt or covenant.*
3. *Acknowledgment by one of two or more joint debtors.*

SHARSWOOD, J.—Lord Coke announced the distinction between the actions of debt, and of covenant or assumpsit upon an agreement to pay a sum of money by installments, which has been recognized and followed since. “If a man be bound in a bond or by contract to another to pay a hundred pounds at five several days, he shall not have an action of debt before the last day be past.” “But if a man be bound in recognizance to pay a hundred pounds at five several days, presently after the first day of payment he shall have execution upon the recognizance for that sum, and shall not tarry till the last be past, for that it is in the nature of several judgments.” “And so it is of a covenant of promise, after the first default an action of covenant or an action upon the case doth lie, for they are several in their nature:” Co. Litt., 292, b. Lord Loughborough reviewed all the law on this subject in *Rudder vs. Price*, 1 H. Blackst., 547, in which it was held that an action of debt will not lie on a promissory

note payable by installments till the last day of payment be past. He shows that prior to the case of *Cook vs. Whorwood*, 2 Saund., 337, it was the uniform course where an action of assumpsit was brought before all the installments were due, to allow a recovery in damages for those still to accrue and come due, upon the notion that after a judgment on the contract no further recovery could be had: *Beckwith vs. Nott*, Cro. Jac., 504; *Peck vs. Ambler*, Dyer, 113, a, note; *Miller vs. Miller*, Cro. Car., 241. But in *Cook vs Whorwood*, which was assumpsit to perform an award to pay money in installments, it was objected that all the days of payment were not past, but the Court of King's Bench, Sir Matthew Hale being then Chief Justice, was clear that the action might be brought for such money only as was due at the time of bringing the action, and the plaintiff could recover damages accordingly; and when another sum of the money awarded should come due, the plaintiff might commence a new action for that also, and *toties quoties*. The law must be now considered as settled in conformity to this doctrine: *Tucker vs. Randall*, 2 Mass., 283; *Greenleaf vs. Kellogg*, *Ibid*, 58; *Cooley vs. Rose*, 3 *Ibid*, 221.

If then the plaintiff could have maintained a suit for the first installment in this case immediately after it fell due, his cause of action then accrued, and the statute of limitations began to run. It is unnecessary to inquire what the law would have been if this had been an action of debt and the plea *actio non accrevit infra sex annos*, for as we have seen, an action of debt could not have been maintained on this promissory note until after all the installments had fallen due. But being assumpsit there would seem to be no question that as to the first installment the action was barred: *Burnham vs. Brown*, 23 Maine, 400; 2 Parsons on Contracts, 373.

Nor is it any longer open to question that a payment on account or an acknowledgment by one of two or more joint debtors will not take the case out of the statute as to the others: *Coleman vs. Faber*, 10 Harris, 156; *Levy vs. Cadet*, 17 S. & R., 126; *Searight vs. Craighead*, 1 Penn. Rep., 135; *Houser vs. Irvine*, 3 W. & S., 345; *Schoneman vs. Fegley*, 7 Barr., 433.

What, then, is the effect of this rule when applied in a joint action against several joint debtors? Certainly not that it shall sever the judgment, which in a joint action *ex contractu* would be an anomaly. In such a proceeding, if evidence is offered of an acknowledgment by one of the defendants, it is strictly inadmissible, unless indeed offered to be followed by a similar acknowledgment or payment by



the others, which would be sufficient to take the case out of the statute as to all. It follows that in this case the jury should have been instructed to find for the plaintiff as against all the defendants, only the amount of the second installment and interest. Whether the plaintiff could maintain an action against those not affected by the bar of the statute, in consequence of their acknowledgment or payment for the first installment, need not be now discussed, nor on what principles contribution between the joint debtors is to be regulated. Sufficient for the day is the evil thereof. Upon a writ of error by the defendants, the verdict and general judgment entered on, the verdict could not have been sustained. It is in effect several judgments in a joint action. We must assume that the defendants acquiesce, as they do not complain. But what injury has been done to the plaintiff in error? He has in his joint action by the verdict and judgment below all the benefits which he could possibly have attained, had he brought several actions against each defendant. It would evidently be an injury to him to reverse this judgment, and send the case back for another trial, which must result in a verdict and judgment against all for the less sum, leaving the plaintiff to preserve his separate remedies against those as to whom the bar of the statute is saved.

Judgment affirmed.

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## *SUPREME COURT OF MISSOURI.*

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MARCH TERM, 1872.

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*DAVID L. SHAW and WILLIAM LOYD, Appellants, vs. ÆTNA INSURANCE COMPANY, Respondents.*

ADAMS, WASH, J.—This was an action on a policy of insurance issued by defendant.

The plaintiff filed a second amended petition, to which the defendant demurred, which was sustained, and judgment given on the demurrer against the plaintiffs, from which they appealed to the Gen-

eral Term, when the judgment of the Special Term was affirmed; and the plaintiffs have appealed to this court.

The petition substantially sets forth that the plaintiffs being the owners of five barges of ice, on the upper Mississippi river, consigned the same to Scherholz & Klinesmith, of the city of St. Louis, to be sold by them on commission; that the plaintiffs ordered the consignees to have the ice insured, and that the consignees undertook the agency, and agreed to have the ice insured for plaintiffs. Instead of insuring the ice in the names of the plaintiffs, they made the insurance in their own names, to indemnify themselves, in case of loss, as they would be liable for such loss, having disobeyed the instructions of their principals in not procuring insurance in their names. One of the barges of ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs; and this suit was brought by them, as assignees, for the value of the lost cargo.

The alleged ground of demurrer was, that the consignees had no insurable interest in the ice.

A consignee, as such, has no insurable interest in goods consigned to him for sale on commission, unless it be to the extent of the commissions or profits he expects to derive from such sales. This he has the right to insure, regardless of any instructions from the consignor. But if he accepts a consignment, with instructions from his principals to insure for their benefit, it becomes his duty to insure; and if he neglects to do so, and a loss occurs, he is liable to them for the amount. The consignees, in the case under consideration, instead of taking out a new policy in the names of their principals, had the risk entered on their own policy in their own names, as a convenient mode of indemnifying themselves against such damages as they might suffer in not insuring in the names of their principals. I think they had the right to this to protect themselves, and to this end they ought to be considered as interested to the full value of the ice. See *Bartlett et al. vs. Walter*, 13 Mass. R., 297; *Oliver vs. Green*, 3 Mass. R., 133; *Hukirru vs. Keil*, 27 N. Y., 163.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors, and insured in their own names for them.

My impression is, that in such case the "positive stipulation of the underwriter to pay the loss to the agent, would never be rendered void by the liability of the party really assured to sustain an action on the policy in his own name." See 2 Duer. on Ins., Sec. 6, p. 7.

In such case the policy ought to inure to the benefit of the principal, and the agent or consignee be treated as a trustee of an express trust, and the amount of recovery would go to his principal. But whether he is a trustee of an express trust or not, he is nevertheless a trustee for the consignor; and in a suit upon the policy, in the name of the consignee, this may be shown in order to show that he had an insurable interest as trustee for his consignor.

The demurrer in this case ought to have been overruled,  
Judgment reversed and cause remanded.

The other Judges concur.

*Condition of Our Municipal Law.*

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[From the Harrisburg Legal Opinion.]

At a recent meeting of the committee on jurisprudence of the Social Science Association, a paper was read by Hon. Emery Washburn, of the Harvard Law School, upon the vast and constantly increasing accumulation of statutes and decisions.

"The Law of Massachusetts, for example, must be sought in one huge volume of statutes, and ten lesser volumes of Legislative enactments, and one hundred and three volumes of reports though the first of those volumes dates back only as early as 1805. And every year adds a new supplementary volume of legislation, together with two more volumes of decided cases, of all of which the citizen, through himself or his paid counsellor, must know something more or less minutely accurate, in order to come within the legal assumption that no man is ignorant of the law. The law, in this respect, is inexorable in its requirements, and excuses no man for the unpardonable guilt of not knowing what it is. But when we go beyond the borders of our own State, and look for the light of analogy, in understanding our law, to the decided cases of our sister States, we find they number almost two thousand volumes, without including the volumes containing their statutes. Ours is getting to be the experience of the Roman courts, and lawyers in the massiveness of the materials out of which one is to hunt up and gather the law upon any of the thousand questions which are daily arising in a busy, active, thinking and reasoning community. And the time is approaching, if it has not yet arrived, when the country will have to resort to some such measures of relief as the Romans were driven to by the exigencies in which they found themselves by reason of the multiplication of their laws. In the year 131, A. D., *Servius Julianus*, under the direction of Emperor *Hadrian*, collated the edicts which had been promulgated by the *prætors* and magistrates from time to time, and embodied them into a single and complete edict, to which the name "*Perpetual*" was given. This was approved by the Senate, and, as far as it went, became the standard of what the law then was. This was, in effect, collecting and arranging in an orderly manner the rules and principles upon which the former *prætors*

had professed to administer justice during the year for which they had been successively chosen, and giving to them the sanction of the Senate as a perpetual law. The Institutes and Commentaries of Gaius, a renowned lawyer of that day, soon followed, going far toward supplying a summary treatise upon the Roman law. Between that and the great work of Justinian, which appeared about the middle of the sixth century of the Christian era, there had been several attempts to codify the Roman law, with more or less success. But even after all, when the scheme was finally undertaken in earnest, which resulted in the Code, Digest and Institutes of Justinian, the laws to be thereby embodied had been the growth of a thousand years, and filled many thousand volumes—so many that nobody could buy or read them. This seems to be an epitome of the juridical history of every civilized country.

While, therefore, in view of the vast mass of the material of which our law is composed, with the constantly accumulating volumes of legislation and judicial decisions, every one is beginning to feel more sensibly the necessity of doing something to remedy the evil, the inquiry comes back how it can be done? For the reasons already stated, the answer can hardly be other than that relief must be sought in something like a code. Fourteen of the States now have codifying commissions at work on their laws. On the other hand, a complete code may be set down as an impossibility, under such a system of legislation as ours. In New York it is near twenty years since able commissioners reported five several codes under the authority of the legislature, not one of which has been acted upon. An able commissioner appointed to frame a code of criminal law for the Commonwealth, which is a matter, one would suppose, of primary necessity, reported such a code in 1844, twenty-seven years ago, but the legislature has never found time to take it up to be acted upon, and it is now all but forgotten; and yet that something of immense advantage—if not all that is desired—may be done in the direction of a code may be easily shown. Every revision of our statutes has been a step in that direction. Our code of practice, such as it is, is an approximation to a code upon a particular subject of the law, for what the profession had before depended chiefly upon the common law. But there is enough in these to suggest a hint of what may be done in the process of time, if the legislature will take hold of the work in earnest. Let them put the work into single hands, a single subject to each individual—not the whole body of the

law at once, but some of the most practically important departments of it, or, what, perhaps, would be wiser, select some one subject, like that of mortgages, or insurance, or wills and administration, and commit it to some competent and experienced lawyer, to be selected for his fitness for the work, irrespective of his political biases or associations, and commission him to state in a condensed, orderly, intelligible form the law upon that subject, so far as it has been declared by statute or adjudicated by the court. Let him report this to the legislature in the form of an act, and then let it be submitted to a proper committee and opened to public censure and comment; and, when perfected, let it be passed upon by the legislature and declared to be the law. If it did no more, it would be "posting up," as it were, the law on that subject to the date of its enactment in an institutional form, and serve for a new starting point, behind which courts and lawyers would not have to go to find out what the law then was. If this can be done with success, with one or two subjects in a year, it would not be long before, upon all the most important matters of practical interest, the public would have an authoritative statement and exposition; and thus the advantages of a code would be gained, without any sudden derangement of the order of things by substituting an entire code at once for the form in which the law has hitherto been accessible.

"If it is said this contemplates confiding too much to the learning, good sense and capacity of one man, it may be answered that if three or five men engage in it as a commission to do the original work, there is quite sure to arise embarrassments from a diversity of opinions between them, or the whole will be directed and controlled by the influence of a stronger will or a superior capacity on the part of some one of the commission, whereby numbers become a hindrance or a clog rather than a help in accomplishing the work. And we are borne out in recommending a single commissioner by what we know, historically, of the mode in which the most successful and famous codes in the world have been prepared. The Institutes of Justinian, though drawn up by a commission of three, are founded almost wholly upon the Institutes of Gaius, a private writer, while we have authority for asserting that the commission of five who framed the Code Napoleon, borrowed more than three-quarters of this code of France by "literal extracts from the works of Pothier." And though we may not have in our profession men whose services could be commanded who could pretend to a scope and accuracy of learning like

those of Gaius or Pothier, we have no reason to doubt that not a few might be found who could, as ably and as accurately, state what had been enacted and adjudged upon any one subject of our law, as the ablest jurisconsult of ancient or modern fame. Such a commissioner, in addition to his own discretion or diligence in gathering up the law from the statute book and volumes of reports, would have the aid of able treatises to guide them upon almost every subject in which courts or lawyers are interested. And if the experiment could be once tried, there is little danger of its failing to accomplish an incalculable amount of good. The sooner, moreover, that the work is begun, the better. The present evil of the vastness of the undigested mass of material of which our law consists is growing greater every year, and, consequently, is becoming more difficult to overcome. It is a question in which every one has an interest, and it ought to command a more general attention than it has hitherto done. If the people would have relief, they must undertake the work themselves, since neither czars, nor kings, nor emperors of the Old World can inaugurate a code by which to relieve the necessities of the New."



### *Insurance of Goods in Trust and on Commission.*

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[From the St. Louis Western Insurance Review—April.]

The large amounts of perishable goods which are transported from place to place, which come into the hands of warehousemen, factors, agents and consignees, renders the subject of insurance, by the various parties interested, one of great importance. The insurance interest of a consignee or factor is of the same equitable nature as that of a trustee or mortgagee, but the intimate relations of consignee, principal and factor, have given rise to new and additional rights and duties; but the adjudications of the courts are now comparatively clear and satisfactory, and the law, as laid down by the courts, is now generally incorporated into the policies, and made a part of the contract.

In the absence of instructions, a consignee is not bound to make insurance on property consigned to him, unless it is shown to be the custom of the place to which the goods are consigned; (*DeForest vs. Ins. Co.*, 1 Hall, 84;) but if he undertakes to make insurance on the goods, or is ordered to make such insurance, and he fails to do so, he is liable in an action to the amount of the consignor's loss *Gillet vs. Mawman*, 1 Taunt., 136; *Smith vs. Lascelles*, (2 T. R., 187;) and if the consignor send bills of lading with orders to insure, the consignee must insure or not accept the bills. (*Smith vs. Lascelles*, *supra*.)

If a bailee insures without stating that the goods are held in trust, or on commission, or some other expression indicating his special property, he can recover only the amount of his liens or charges, and the bailor is not entitled to a share in the proceeds of the insurance money. (*Gillet vs. Mawman*, 1 Taunt., 136; *Brichtee vs. Lafayette Ins. Co.*, 2 Hall, 372; *Balt. Ins. Co. vs. Loney*, 20 Md., 20.)

The assured should communicate to the underwriter the nature of his interest in the subject insured, though it need not be specified in the policy. And when no such communication is made, and the party has only a special interest, and not the principal ownership—if this circumstance makes a material difference in the risk or would have altered the amount of premium, the omission will vitiate the

policy: (*Russell vs. Union Ins. Co.*, 1 Cond. Marsh, 105 N., 7.) It must be shown who are the contracting parties, and the interest of agent and principal must be truly described: (*Cohen vs. Haman*, 5 Taunt., 101.) And where the factors insure merchandise in store held in trust, and had received no orders to insure from their consignors, they were held entitled to recover only to the amount of their liens or charges, and that the policy could not be extended so as to protect the interest of any of the consignors: (*Parks vs. General Ins. Co.*, 5 Pick., 34.) A policy expressed in general terms to be for the benefit of whom it may concern, will cover the interests of any person who has authorized insurance, (*Seamans vs. Loring*, 1 Mason, 127,) or who afterward ratifies the act of his agent in obtaining such insurance, (*Waters vs. Monarch Ins. Co.*, 5 Ell. & Bl., 870;) and this ratification may be after a loss has occurred, (*Watkins vs. Durand*, 1 Port. Ala., 251.) This proceeds on the familiar doctrine that if one acting as agent, although without actual authority, makes a contract for the benefit of another, the latter may at any time afterward, so long as the contract continues in force, upon being apprised of its existence, adopt the act of the agent. In *Hagedorn vs. Oliverson*, 2 M. & S., 485, the plaintiff, in his general policy, insured as well in his own name as for, and in the names of all and every other person or persons to whom the same doth, may, or shall appertain, and intended to include goods of one who was an alien enemy: At the close of the war, two years after loss, the alien ratified the act of his agent, and was held entitled to recover.

It must be shown that the party claiming the benefit of the policy directed the insurance to be effected, or that some one acting in the capacity of agent had insured the goods with the intention of protecting the claimant's interest, and it is on the part of the defendant to prove that the property was intended to be insured; (*Steele vs. Ins. Co.*, 17 Penn. St., 290;) and where the plaintiff had purchased goods and shipped them, and there was no evidence of intercourse between the person who took the insurance and the plaintiff, or that the insured had any agency in purchasing or shipping the goods, or that he intended to insure for plaintiff, he was held not entitled to recover: (*DeBolle vs. Penn. Ins. Co.*, 4 Wharton, 67.) To recover on the policy, the principal must show that he ratified the insurance, or that the agent actually received money on his goods: (*Stillwell vs. Staples*, 19 N. Y., 401.) In this last case, certain cloth sent to the insured was destroyed by fire, there being no agreement or custom

requiring the bailee to insure. He recovered on his policy, which covered his property and goods held in trust.

*Held*—That the bailor was not entitled to a share of the money unless received for the loss of his goods.

A consignee to whom a cargo is consigned has an insurable interest in his expected commissions, and may insure the same while on the voyage: (*French vs. Hope Ins. Co.*, 16 Pick., 397; *Putnam vs. Mercantile Ins. Co.*, 5 Met., 386.) By the delivery of a bill of lading, the property in the goods is vested in the consignee, though it is a defeasible property. He has the control and disposing power while on the way. He can transfer the bills by endorsement so as to bind the general owner, if for a general consideration: (*Lucena vs. Crawford*, 3 B. & P., 75.)

Mr. Phillips, in his Treatise on Insurance, (2 Phil. Ins., 1243) considers the amount of a consignee's insurable interest to be only that for which he has a lien. The authorities, however, do not support this doctrine. A factor, with power to sell, has the right to reclaim the goods, if improperly usurped, and to maintain an action of trover if they are detained in the hands of others. Actual possession, coupled with the right of possession, confers on the holder, who may not have the legal title, the power to insure the property as his own. The power of sale vests in him the legal ownership. It is his duty to guard and protect the property, and he has the corresponding right to insure it. There is no principle of law which prescribes a narrower rule of insurable interest in a policy against fire, than for a policy against the perils of the sea. The result of adjudication on this subject is found in the elaborate decision of the Court in *DeForest vs. Fulton Insurance Co.*, (1 Hall, 84), in which it is held that a consignee has an insurable interest in property consigned to him, to the full extent of its value, and may insure it in his own name and recover the amount payable for a loss on an averment of interest in himself. The fact that the consignee becomes a trustee for his principal or not, is not for the insurer to consider. The principal can recover his proportionate share received by his agent under such policy: *Siter vs. Morris*, 13 Penn. St., 218.

A general policy expressed to cover goods in trust or on commission will cover "household furniture, wearing apparel and books," received and held on deposit subject to the order of the owner: (*Siter vs. Morris*, *supra*.) So a policy expressed to be on a pork house, and articles comprising the stock of a pork house, will include

the hogs of various owners with the implements, &c., within the buildings, without regard to the ownership of each or any article which was at the risk of the insured, and will extend to goods sold but not delivered: *Ætna Insurance Co. vs. Jackson*, 16 B. Mon., 242.

Although a fire policy is a personal contract with the insured and protects those only whose interests are intended to be protected, yet it is not forbidden by the law that a policy should be framed so that the insurance shall be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risk, shall become in turn the parties really insured: 2 Duer. Ins., 49, sec. 9, § 31.

Such insurance is certainly for the benefit of the mercantile community, as a separate insurance for uncertain times could not be taken out on each separate parcel, and the confidence created between vendors and vendees is considered, by commission merchants, of sufficient importance to justify continued insurance, at their own expense, for all goods consigned to them.

In the case of *Waring vs. Indemnity Ins. Co.*, 45 N. Y., 606, reported October, 1871, in the *Review*, the doctrine is extended so as to cover goods in which the plaintiffs had no property and no lien. The property was in the United States bonded warehouse and the sale had been consummated, so that the vendor had not the slightest claim against it. It remained in the warehouse without expense to the vendees, and according to custom in the plaintiff's constructive possession, *held*, entitled to recover the full value.

From the Pittsburg Legal Journal.]

*Court of Queen's Bench in Banco.*

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*CRESSWELL* vs. *CROWDY*.

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This was a very curious case. It was an action by a nephew against his aunt, on an agreement to pay him an annuity on account of his promising not to marry a certain lady. The declaration set forth that in 1868, the aunt, from her care and affection for her nephew, who was 23 years of age, conditionally on his not marrying a certain young lady, a widow with three children, whom he had lately met on board ship on a voyage from the Cape of Good Hope, agreed if he should continue unmarried to the young lady, to allow him £300 a year during his life. For some reason or other, however, the defendant had intermitted her payments, and in 1871 this action was brought to recover some arrears. The aunt demurred on the ground that the contract was not legally valid.

Mr. Manisty, Q. C., and Mr. Wood Hill, were for the plaintiff, the nephew; Mr. Brown, Q. C., and Mr. F. M. White, were for the defendant, the aunt.

Mr. Brown urged that there was no legal consideration.

The Lord Chief Justice.—Oh, yes, there was; the nephew agreed to forego his natural freedom of marriage, and to give up the young lady he was attached to.

Mr. Brown.—Perhaps she would not have had him.

Mr. Justice Blackburn.—Never mind, he agreed not to ask her. (Laughter.)

Mr. Brown.—Perhaps he had asked her, and she had refused him already.

Mr. Justice Blackburn.—In most cases I have heard of, the lady refused in the first instance. (Much laughter.)

The Lord Chief Justice.—The aunt appears to have had such a persuasion that the lady would have him, that she thought it necessary to bind him not to propose to her.

Mr. Brown.—Ought such a contract to be enforced?

The Lord Chief Justice.—Why not? Aunts should not enter into such agreements if they don't intend to keep them. (Laughter.)

Mr. Brown.—It is contrary to public policy, as it is in restraint of marriage.

Mr. Justice Blackburn.—Marriage with a particular lady, that is all; not restraint of marriage generally. There are scores of cases in which obligations not to marry particular persons are valid. Nay, there is a very bad case in which the stipulation was not to marry any Scotchman, (much laughter,) yet it was held valid, though it was strongly urged that it was likely to raise ill blood between the two countries. (Great laughter.) It is not a restraint of marriage generally.

Mr. Brown.—Yes, my lord; but if the aunt won't let him marry the only lady he loves, the probability is that he will not marry at all. (Much laughter.)

Mr. Justice Blackburn.—Oh, that is too romantic, Mr. Brown. (Laughter.)

Mr. Brown.—My lord, this lady is a widow.

The Lord Chief Justice.—What of that? He may be very fond of her. (Laughter.)

Mr. Brown.—She has three children. (Laughter.)

The Lord Chief Justice.—What then? He may be so fond of her that he may not care about that. (Laughter.)

Mr. Justice Quain.—Or he may be so fond of children that he may really prefer it. (Laughter.)

Mr. Brown went into the cases to show that contracts against marriage were invalid; but

Mr. Justice Blackburn challenged him to cite one in which it was held that a contract not to marry a particular person was invalid; and no such case was cited, the learned judge asserting that there were many cases to the contrary.

Mr. Brown, however, still argued that the natural effect of preventing a young man from marrying the only woman he cared about, was to deter him from marrying at all, and this the law deemed mischievous.

Mr. Justice Blackburn again asked for an authority in point, and it was admitted there was none.

Mr. Justice Lush.—It is a common thing to leave a provision in a will for a widow, on condition of her not re-marrying.

The Court, without calling upon the counsel for the plaintiff, pro-

nounced judgment in his favor. There was nothing, they said, in the agreement in restraint of marriage generally, and, therefore, there was nothing in it which made it illegal or invalid. No doubt a general contract not to marry at all would be invalid, but this was quite different. Judgment for the plaintiff.

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IN 184—, in the county of L., there was a trial before the Circuit Court, in which there was an unusual display of forensic eloquence. It was upon an indictment against one McLaren and one Wiggs, charging an assault with intent to commit a rape. The proof showed that the two defendants went to a house of doubtful fame and knocked at the door, and on being refused admittance, pushed in; and all that followed was some verbal importunities. Of course there was no foundation for the charge. But the Attorney-General, being a man of great humor and fond of fun, permitted the trial to proceed. One of the defendants, McLaren, succeeded in employing a young Irishman, whose name was K——, and who had been but a few months in the profession, and with very slender legal resources. Poor Wiggs was not able to employ any one, but chose to rely on the incidental benefits to result from the defense of his co-defendant. Judge T—— a very worthy man, had no turn for humor—never told an anecdote, and seldom smiled.

K—— arose to make his speech, and manifested in manner and appearance, a deep sense of the importance of the case. He said: "May it please this honorable court, (and I know it is as honorable a court as ever sat on the bench, for I have often said behind your Honor's back, what I say here to your face, that if I had to be tried for me life, I would rather be tried before your Honor than any *maun* in Tennessee.) May it please this honorable court, I lay it down to be the la, and I defy hiven, yarth and hell to controvert it, that words can not constitute an assault. And, gintlemen of the jury, when I look around upon your faces, upon this solemn and momentous occasion, and think of the vaust responsibilities which rest upon you, I wish I could put one foot down on the yarth, and the other upon the Georgium sidus, I would bring down the forked lightnings of hiven, and throw them among ye, to illuminate yer dark understandings!



If the great men of ould, such men as Fox, and Pitt, and Curran, and Grattan, and Blackstone, could peep down o'er the battlements of hiven upon this yarth below, they would cry out with one united voice: McLaren! McLaren! McLaren is not guilty!—and—also—Wiggs!" It is needless to say that the defendants were acquitted. But the eloquence of the attorney, while it struck the crowd with amazement, excited a roar of laughter among the bar.

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IN one of the Western States, a trial was had before a Justice of the Peace. The plaintiff sued the defendant on an account for \$300, while the statute of the State limited the jurisdiction to \$250, on that species of indebtedness. The attorney for defendant, of course, raised that point, and insisted on a dismissal of the case, for the want of jurisdiction. But the Justice replied, "I have found a remedy for that. I shall render two judgments for equal amounts, and order executions accordingly."

## BOOK NOTICES.

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*The Law of Contracts.* By FRANCIS HILLIARD. In two volumes.  
Published by Kay & Brother, Philadelphia.

This is the latest work published upon the subject of contracts, and on account of its importance, deserves particular notice and a more extended one than our space will admit of. The law of contracts constitutes by far the largest and most intricate division into which the civil, as contradistinguished from the criminal law, is arranged, and a work embracing the principles that have been adjudicated upon the subject, including those determined by recent decisions, would be of incalculable value to the profession at large. The reputation of Mr. Hilliard is too favorably known to be questioned, and his admirable treatises upon torts, injunctions, etc., have secured him a deserved prominence among text writers. This of itself, however, should not be the exclusive test of the accuracy and completeness of the work now before us, as it too frequently happens that authors grow careless when they reach their climacteric, and impress the marks of haste and profuseness upon the pages of their subsequent productions. On the other hand, the attempt to generalize legal principles and compress multum in parvo, has also been hurtful to the profession, as by so doing the object is to make an exact science of the law which from the very nature of the subject, it is impossible to do. The law of contracts controls the most numerous and complex transactions of every day life, and the reported cases in England and America show that most of them have been determined by its principles. It follows, therefore, that it is a subject which of all others connected with this science, deserves the most careful and elaborate exposition. In this view of the case, we feel constrained to say that Mr. Hilliard's treatise is defective.

We agree with him that it is the better plan to present in the text the decided cases constituting as they do "the warp and woof of the work," and utterly condemn the "common criticism" that such a compilation should be a mere digest. The plan adopted by him in this respect, we hold to be the proper one; for it enables the reader himself to judge from the facts in each case presented as to the cor-

rectness of the rules and principles which the author deduces from it. Mr. Parsons, in his work on contracts, adopted the other plan; that is, he undertook to state in the text his conclusions upon the decided cases, referring the reader to the cases themselves in the foot notes. He has never been obnoxious to the charge of inaccuracy that we are aware of; and in this he differs from Mr. Story, whose entire series of law publications abound with mistakes and errors, committed in the haste of preparation.

It requires no little care and thought to enable one to state concisely and accurately the exact point determined in a given case, and to separate mere obiter from authoritative decision. Reliable compilers and digest makers are not so common as might be supposed, and it very frequently happens that the case referred to in the foot note when examined, decides a question altogether different from the author's conclusions as laid down in the text. Another advantage of setting forth the facts of each case in the text, consists in the great convenience to the profession, to the great majority of whom the reported cases are inaccessible. While we think, therefore, that Mr. Hilliard's plan in this respect, for these reasons, superior to that of Mr. Parsons, we are at a loss to know how the former could do justice to the almost inexhaustible subject of his work in two volumes, particularly when so much of his space is devoted to extracts of the opinions of judges upon the numerous questions connected with the law of contracts. Mr. Benjamin, in his thorough and elaborate work on the contract of sale, pursues the same plan as Mr. Hilliard does in his work upon the more comprehensive subject of contracts in general; that is, he gives a brief statement of each case involving the principles of that contract in the text and comments upon it; and let us here add, with such logical clearness and force as to convince the reader of the truth of his conclusions. But there is a masterly completeness and at the same time conciseness in his treatment of this one branch of the law of contracts, which does not so conspicuously appear in Mr. Hilliard's compendium of the law of contracts in general.

One feature of Mr. Hilliard's work is, that the decided cases of which a brief abstract is attempted, are, to a large extent, recent, and inasmuch as the author's object was to compress as much matter in as little space as possible, he acted wisely in ignoring the earlier decisions, as reference to them would have swelled his book to unwieldly proportions.

We think, in fine, that this is the fault of the work, an attempt to give an abstract of the principal decisions bearing upon contracts, and at the same time compress them within too small a compass. All cases are rigorously excluded from the text in Mr. Parson's work. He has with much care deduced the leading principles of the law, and arranged them as compactly and logically as he could, and yet three large volumes were required within which to compress his condensed arrangement of the subject; while Mr. Hilliard, though citing and commenting upon cases in the text, has only two volumes of about the same size.

We do not think that any thing is gained by the novel way in which Mr. Hilliard treats his subject, in departing from the general practice of looking at rights through the medium of remedies, and adopting the plan of directly explaining rights, and incidentally inquiring by what remedies they may be enforced. Instead of, for instance, considering the subjects of the statute of limitations and payment as defenses, he treats of the one in connection with the general subject of time, and the other as a mode of performing the contract upon which an action may be founded. He follows the same consecutive rather than artificial plan, in considering partnership as one among joint contracts, instead of making it a distinct and independent subject. We think this arrangement well enough, but not superior to the old plan.

The last edition of Parsons, on this subject, appeared in 1866, and the peculiar merit in Mr. Hilliards's treatise, consists perhaps in the fact that it embodies an abstract of the decisions upon the subject since that time.

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*A Digest of the Reported English Cases Relating to Patents, Trade Marks and Copyrights, determined in the House of Lords and the Courts of Common Law and Equity, with reference to the Statutes; founded on the Analytical Digest by Harrison, and adapted to the Present Practice of the Law.* By R. A. FISHER, of the Middle Temple. Edited and brought down to the present time, with index, table of cases, etc., by HENRY HOOPER. Published by Robert Clark & Co., Cincinnati, Ohio. 8 vo. Price, \$4 00.

This work contains a digest of the existing law, equity, and practice relating to patents, trade marks and copyrights, as determined in

the English Courts of Common Law and Equity, including the House of Lords. To the Analytical Digest of Harrison and the later Digest of R. A. Fisher, have been added all the contemporaneous reports of English cases upon the above branches of the law, down to the present year.

In his preface to the American edition, the editor states that the English statutes upon the subjects, when short and comprehensive in their terms, have been introduced in the language of the legislature; overruled cases have been omitted, as well as obsolete law. In short, it is believed that all rulings and decisions, from the earliest period to the present time, upon patents, trade marks and copyrights, are here collated and presented for the use of the profession.

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*The Cincinnati Superior Court Reporter*, Vol. 2, No. 1. Published by Robert Clarke & Co., Cincinnati.

In the prospectus of this volume of the above work, the publishers state that a careful selection of cases will be made, more especially those relating to the various branches of mercantile law, insurance, corporations, contracts, etc.; and, as a new feature, which they think will prove valuable to the profession; concise reports will be given of all important *questions of practice* which may arise and be determined in this court, either in special or general term. The volume will consist of twelve numbers of forty-eight pages each, and an extra one containing title page, table of cases, and index, making in all a volume of over 600 pages.

Subscription price, \$5 00 per annum.

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*Reports of Cases Decided in the Circuit and District Courts of the United States within the Southern District of Ohio.* By LEWIS H. BOND. Vol. 1. Robert Clark & Co., Cincinnati, Ohio.

This volume contains a selected portion of the numerous cases that were brought before Judge Humphrey H. Leavitt, of the United States Circuit Court for the Southern District of Ohio, between the years 1855 and 1871, when he retired from the bench, after his long judicial service. The Reporter has selected only those cases that would prove of general interest to the profession. For instance, he

has purposely omitted those arising under the fugitive slave act. The abolishment of slavery, and the certainty that it could never again have an existence in this country, rendered the report of such cases altogether superfluous. And for a reason kindred to this, the numerous exciting cases growing out of and connected with the late civil war, with one or two exceptions, do not appear. The work especially commends itself to those attorneys whose practice chiefly lies in the Federal Courts.

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*A Compilation of the the Statute Laws of Tennessee, of a General and Permanent Nature, Compiled on the Basis of the Code of Tennessee, with Notes and References, to include the Acts of 1870-71, By SEYMOUR D. THOMPSON AND THOMAS M. STEGER, Saint Louis: W. J. Gilbert, 1871. In three volumes.*

The first volume of this work was issued in October last. It was advertised to appear in two volumes, but the great length to which it has been extended by the index, and the editor's notes—in all to about 2,300 pages, has induced the publisher to bind it in three volumes instead of two. We have been favored with the first volume, and with sheets of the entire work, including the index.

The progress of this work has been watched by the profession in Tennessee with considerable solicitude. This solicitude has arisen not only from the great importance of such a work to the profession and public in Tennessee, but from the fact that the young gentlemen who have had it in hand did not bring to the task that enlarged professional experience which such an undertaking is supposed to require. We have not, however, on this account, been disposed to prejudge their effort unfavorably. We do not forget that some of the greatest works which adorn the profession of the law have been written by young men. Blackstone's Commentaries were the lectures of a brifless barrister. His subsequent reports—the work of the matured Judge—have never been held in any high esteem. The author of Smith's Leading Cases, died at a very early age; and the treatise of Sir William Jones on the law of Bailments, a work which has never, perhaps, been mentioned except in praise, was not only written by him when he was a young man, but when he was comparatively a beginner in the law. It is not unlikely that the editors of the work before us may have felt that they could only compensate for the lack of years and experience by increased assiduity and dili-

gence; and that, in the absence of a professional reputation to fortify their work in the public estimation, it could only succeed upon clear merit, established by the tests of time and use.

From such an examination, as a reviewer is expected to make, the work appears to be the result of much industry and research. It is built upon the basis, or skeleton, so to speak, of the Code of 1858, preserving without alteration, the sectional numbers, and analytical arrangement of that edition. Into these are dove-tailed the laws passed since the Code, under their proper titles. The editors have labored to trace the various sections of the Code to the original acts of assembly from which they were compiled, or to the statute books of other States, from which they appear to have been drawn by the revisers of the Code, and seem to have succeeded in most instances. By this means, the decisions of the Supreme Court of Tennessee, construing the laws from which the Code was compiled, are seen to be applicable in most cases to the Code itself; and it is also seen that the Code of 1858 was not, as some have supposed, a departure from, or innovation upon the old system; but simply a step or resting place in our judicial growth. This plan, together with the plan of following each section with an abstract of the decisions of the Supreme Court of Tennessee, construing the original act from which it was compiled, and construing the statute as it stands in the Code, has the happy effect of showing the connection between the old decisions and the new, and showing how far, if at all, the old law has been modified by the change of phraseology in which is expressed the Code. We notice also, in many cases where a statute appears to have changed a previously existing rule of law, that the cases construing or enunciating the old law, are first collated, and then followed by the decisions under the statute. The laws are thus presented in the language of the Legislature, and labelled with the insignia of their age and origin, and their meaning explained in the language of the Court of last resort of Tennessee. The importance of tracing to their origin those sections of the Code which have never, either before or since the Code, received judicial exposition, may not at first be apparent; but if the Legislature were asked to repeal or change any particular provision of the Code, it might be important to be able to see at a glance how long it has been a rule of property or procedure in this State; or whether it originated with our Legislature, or came down to us from the parent State of North Carolina, or was borrowed by the revisers of the Code of 1858 from the statute



books of some other State. For, turning over these pages, we see that many of the sections of the Code have not only been rules of law to ourselves and our ancestors since Tennessee has been a State, but since North Carolina became a Colony. Thus, it is seen that the last clause of § 2281 of the Code—a statute of limitation which bars all suits against executors and administrators, after the lapse of seven years, without excepting persons under disability—has come down to us from the first Legislature of the parent Colony, which was held in the year 1715, at the house of Captain Richard Sanderson, at Little River, North Carolina; and to this Legislature we are indebted for several other laws retained in the Code. So, running through our statutes of limitation; of descent and distribution; those relating to wills and the settlement of the estates of decedents; those relating to the relations of husband and wife, parent and child, guardian and ward, master and apprentice, and many others, we are carried back to the old Colonial Legislatures. So we see that several provisions relating to procedure at law, stand as they stood in the old practice act of 1794; and many of the provisions relating to chancery practice have come down to us from the chancery act of 1801. On the other hand, this edition of our Code is everywhere made to exhibit the changeful spirit of later years. Thus, the leading provisions of the chapter on the amendment of actions were given us by the prolific Legislature of 1851–2, which passed what Judge McKinney termed “a very strong and universal statute of jeofails”—so strong and imperative, indeed, that our courts hardly know where and when to stop in the granting of amendments in civil proceedings. The same Legislature reformed our chancery practice, and our statutory action of ejectments, as well as our acts relating to the administration of insolvent estates; and inaugurated that system of internal improvements which has covered our State with a net-work of railroads, and saddled us with an enormous debt. It also appears that, for many new provisions, we are indebted to the Codes of Alabama and Iowa. Thus, our forms of pleading, (which certainly do not lack the merit of brevity,) and many of our criminal statutes are credited to the Alabama Code of 1852; while a few scattering provisions appear to have been drawn from the Iowa Revision of 1851, and a still less number from the Revised statutes of New York.

The general laws passed since the Code, are followed with citations, showing the volume of session acts from which they are compiled, and exhibiting in each instance their original chapter and

section, and the date at which they took effect. Some of these acts, though of recent date, are by no means new. Thus, the Act of 1870, against carrying concealed weapons, is but a re-enactment of the old law with greater stringency. So, the "sedition law," § 47, 66*a*, an Act which might, perhaps, be spared from our statute books without public detriment, though it stands as the Act of 1865, ch. 15, § 1, is really the Act of 1715, ch. 31, § 1, in a modified form—an act passed "by his Excellency, the Palatine, and the rest of the true and absolute Lords Proprietors of the Province of Carolina, by and with the advice and consent of the members of the General Assembly met at Little River," at the aforesaid house of Capt. Richard Sanderson. So, the Act of 1868–9, ch. 14, § 1, relating to private ways, which appears in this compilation as § 119, 3*a*, is really the Act of 1811, ch. 60, § 1,—an Act which was declared unconstitutional by a majority of the Supreme Court, in *Clack vs. White*, 2 Swan, 540, 547.

The notes in the part relating to crimes, criminal procedure and *habeas corpus*, are credited to L. B. Horrigan, Esq., of the Memphis Bar, and appear to be the work of a hand familiar with that branch of the law. He has illustrated the text with numerous citations of the decisions of the Supreme Court of Tennessee, as well as other authorities, English and American. The editors, in their preface to the second and third volumes, also acknowledge the assistance of Chancellor East in compiling the notes on Chancery Practice. The third volume is supplemented with an elaborate index, comprising 234 pages of matter closely set in double columns, and abounding in numerous titles and cross-references. This part of the work is credited to James H. Purdy, Esq., formerly of the Memphis Bar. If its titles shall prove as thorough and accurate as they are numerous, this index will not only be a credit to its compiler, but will supply a desideratum in which the old Code was sadly deficient.

The editors also state, that, in pursuance of the original plan of the work, it is brought down no further than to include the acts of 1870–71. The great length of time employed in its compilation, and the fact that it was set up and stereotyped piece by piece, has rendered this course necessary. Otherwise, some of the acts passed since 1871 would appear in the portions last completed, while others would be omitted from their appropriate place in the earlier titles, thus producing confusion. The acts passed since 1871 are promised as a supplement, or on printed slips, so as to be pasted into the work in their appropriate places.

A work of this character can not be thoroughly criticised until it shall have been for some time in use. If this work shall prove to be an accurate reprint of all the general statutes; if the notes of judicial decisions shall be found as accurate and discriminating as they are numerous and well arranged; if no important general statute shall be found to be omitted, and if the index shall be found after use, to be as thorough and exhaustive as it appears to be, we shall be disappointed if it does not take rank with Paschal's Texas Code, which has been so generally commended; although we shall not expect it to go through the numerous editions which have been the good fortune of a smaller work of this character:—Vorhies' Annotated New York Code of Procedure.

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*Shankland's Supplement.*

We have received from the Publishers, Messrs. Paul & Tavel, of Nashville, a copy of the second edition of the *Statutes since 1858*, more commonly known as the "Supplement to the Code," by J. H. Shankland, Esq. This work has already attained a circulation too extensive to require a critical notice at our hands. It may, however, be well to remark that the present edition is a decided improvement upon the former one in respect to size and general appearance. The utility of the volume is also greatly enhanced by the addition of an Abstract of the Laws passed by the Thirty-Seventh General Assembly, 1871, thus presenting the body of the public law supplemental to the Code in a complete form down to the month of March, 1872.

Mr. Shankland's work has been a well directed effort to supply a public exigency. It appeared at a time when great confusion and obscurity clouded the statutes in consequence of voluminous political legislation, countless repeals, and a rapid succession of important changes. Such a period of chaos in the civil government of Tennessee, we may now turn back to only with feelings of mingled curiosity and regret. Its parallel can scarcely occur again. But at last, we feel assured, order and harmony are evolving gradually from former tumult and discord. Among the instruments exerted to the accomplishment of this desired result, no one can fail to recognize the no small usefulness of the compilation of statutes which forms the subject of this notice.

In conclusion, we express the hope that the continued career of the *Supplement* may be no less successful than it has been heretofore.

*A Treatise upon the Law applicable to Negligence.* By THOMAS SAUNDERS, of the Middle Temple. With Notes of American Cases, by HENRY HOOPER.

This volume, containing nearly two hundred and fifty pages, is printed at Cincinnati by Robert Clarke & Co., in handsome style.

We consider the work one of great merit, and prophesy for it, what it certainly deserves, a place among the standard law books of England and America. The author has succeeded signally, in view of the vast increase which of late years has taken place in the number of actions brought in our courts for compensation for injuries occasioned by negligence, and the somewhat obscure state of the law in many particulars applicable to this description of litigation, in supplying in a compendious and convenient shape, a volume by which a ready reference may be obtained to the authorities upon the subject.

We regret that our want of space prevents us from reviewing the work at length. Its style and plan are most admirable, and the subject is treated in its various divisions, in a masterly manner.

In his citation of cases, the author confines himself to the leading cases, in which he is imitated by the American editor; a plan which ought to commend itself to the profession in these days when books are crowded with multitudes of cases upon the points under discussion, which follow a few clear leading decisions upon the same points.

We recommend the work to the profession, with the belief that its readers will be amply repaid for its perusal by its clear exposition of the Law Applicable to Negligence.

We omit in the present number, the names heretofore published in the "chart," except so far as changes have been made, and new and additional names added.

# C H A R T

## OF THE

# Southern Law & Collection Union.

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We give the following changes and additions to the Southern Law and Collection Union since the last (April) number:

### ALABAMA.

County.	Name.	Post Office.
Butler,	Gamble & Powell,	Greenville.
Lowndes,	Clements & Enochs,	Hayneville.
Mobile,	Posey & Tompkins,	Mobile.
Shelby,	A. A. Sterret,	Columbiana.

### ARKANSAS.

Fulton,	J. T. Cunningham,	Pilot Hill.
Independence,	R. P. Willcox,	Batesville.
Saline,	W. L. McKinley,	Benton.
Yell,	Gibson, & Toomer,	Dardanelle.

### CALIFORNIA.

Lassen,	J. S. Chapman,	Susanville.
Mendocino,	J. B. Lamar,	Ukrah.

### CONNECTICUT.

New London,	Wait & Swan,	Norwich.
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**GEORGIA.**

Baldwin,	W. G. McAdoo,	Milledgeville.
Bartow,	Rob't W. Murphey,	Cartersville.
Hart,	C. W. Seidel,	Hartwell.
Wilkes,	W. M. Reese,	Washington.

**ILLINOIS.**

DeWitt,	Palmer & Ferguson,	Clinton.
DuPage,	W. G. Smith,	Wheaton.

**INDIANA.**

Howard,	J. H. Kroh,	Kokomo.
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**IOWA.**

Cass,	J. L. Hanna,	Atlantic.
Clarke,	Chaney & Wilson,	Osceola.
Lee,	Frank Allyn,	Keokuk.
Union,	J. M. Milyan,	Afton.

**KANSAS.**

Jefferson,	W. E. Stanley,	Oskaloosa.
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**MARYLAND.**

Talbot.	C. H. Gibson,	Easton.
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**MISSISSIPPI.**

Amite,	Geo. F. Webb,	Liberty.
Calhoun,	Roane & Roane,	Pittsboro.
Rankin,	W. B. Sheby,	Brandon.
Tishemingo,	L. P. Reynolds,	Jacinto.

**MISSOURI.**

Lincoln,	Wm. Frasier,	Troy.
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**NEW YORK.**

Fulton,	McCarty & Parke,	Gloversville.
New York,	J. A. Marshall,	New York, 40 Wall St.

**NORTH CAROLINA.**

Cherokee,	John Rolan,	Murphey.
Mecklenburg,	W. P. Bynum,	Charlotte.

**SOUTH CAROLINA.**

Barnwell,	Sam'l J. Hay,	Barnwell.
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**TENNESSEE.**

Coffee,	Geo. W. Davidson,	Tullahoma.
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**TEXAS.**

Arkansas,	Wm. W. Dunlap,	Rockport.
Denton,	Jackson & Downing,	Denton.
Kaufman,	Mauion & Adams,	Kaufman.
Wise,	Booth & Ferguson,	Decatur.

**VIRGINIA.**

Campbell,	Wm. & J. W. Daniel,	Lynchburg.
Culpeper,	A. R. Alcocke,	Culpepper.

**WEST VIRGINIA.**

Hardy,	Joseph Sprigg,	Moorefield.
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# THE SOUTHERN LAW REVIEW.

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## *Life Insurance Decisions.*

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Life insurance has already become a subject of great interest to the entire public, and is destined to be of more extended interest; and will soon become a question for the courts and legislatures. It presents questions of intricacy to the judicial mind, and of morals to the philosophical.

These insurances were not found in the commercial nations of Europe, except England; and if allowed in any other, at this time, certainly very few, for what reasons, however, does not appear, unless the reason given in France is the prevailing one, viz: "that it is indecorous to set a price upon the life of a man, and especially a freeman, which is above all price." Questions of *decorum* or morals have not, at any time, retarded these institutions either in England or the United States, except to a very limited degree, and go then more to their extension than existence. We propose herein to notice some of the features of these institutions, not in a moral, but a legal view, their *modus operandi*—together with the decisions upon many points involved; and in order to do this in such manner as to be entirely apprehended as well by the unprofessional as professional reader, we propose to commence with the "application" for a policy.

An application is a written document, (usually printed and furnished by the company,) to be signed by the applicant for insurance, and which enters into and becomes a part of the contract, and for that reason assumes unusual importance. In this application the appli-

cant is to state his name in full, his occupation, residence, place of business, and age; besides these this document contains many minute and personal questions, all of which must be answered in writing. These questions as may be imagined, pertain to the health, present and past, of the applicant, and are intended to give the company such information as will enable them to determine whether the risk is such as they will take. The following specimens, taken from an application of a popular company, will indicate the character of the whole:

1. Has the party now any insurance upon his life?
2. Place and date of birth of party.
3. Present age at nearest birth-day.
4. Is the party married or single?
5. Has the party been vaccinated, or had the Small-pox, or Yellow Fever, Dropsy, Paralysis, Consumption, Spitting of Blood, Scrofula, Gout, Rheumatism, Fits, Liver Complaint, been subject to Cough, Dyspepsia, Dysentery, Bilious Colic, Diarrhea?
6. In what States, nations, etc., the party has resided, and what was the effect of such residence upon the party's health?
7. Name and residence of family physician.
8. What has been recent health of party?
9. Are the habits of life correct and temperate, and have they always been so?
10. Are parents living, and what are their ages and health; if dead, at what ages and of what diseases did they die?

These questions are varied in the applications of different companies, and generally extend along the line of ancestry (both paternal and maternal) for several generations, and sometimes extend to collaterals, as brothers and sisters; also to serious personal injuries and accidents.

If the insurance is made for the benefit of another than the life insured, the fact is to be stated, and the relationship of such persons.

Accompanying these questions and answers, are not unfrequently another test for the family physician.

All these questions and answers are concluded with a general declaration, to the effect that the questions and answers "shall form the basis of the contract," and also, that "any untrue or fraudulent answers, any suppression of facts in regard to the health (or in regard to any pecuniary interest which the insurer may have in the life) of the party insured; any neglect to pay the premium on or before the day it becomes due,—will render the policy null and void, and forfeit all payments thereon; that the policy applied for shall not be binding upon the company until the amount of all premiums due,

or overdue, shall be received, and during the lifetime of the party insured.

The representations made by the insured, in answer to these questions, have generally been considered as warranties, that is, that the fact is as stated, and if not so, the policy may be avoided. If a party in answer to the question, Have you had fits, should answer "No," this is a warranty that the party had never had that disease. If, on the other hand, the answer should be, "Not that I know of," "Not, to the best of my belief, or knowledge," these would limit the warranty to the belief or knowledge. Parsons, in the II. Volume of his Work on Contracts, at page 465, suggests that it is better for the insured always to put his answers in these forms rather than positively. Courts construe these questions and answers liberally in favor of the answerer, generally, unless there be proof of fraud. (*Id.*, same page.) In these, as in all transactions, good faith goes a long way in sustaining the policy, and its absence is an element of great power to the company—when sued.

These questions thus framed and put by the company, are of great variety, and embrace all probabilities which could effect the risk, some very remotely; and are made, frequently, the basis of other questions verbally put and verbally answered. The answers are called *warranties*, more by custom and accommodation than legal definition. If the question and answer are *material*, then the answer is properly called a warranty. What we mean by a material question may be thus illustrated: If the applicant was asked, "Have you ever had fits?" and the answer should be "No," suppose the company on the trial was to prove that in teething during infancy the insured did have fits, and thereby seek to avoid the policy, we doubt not the courts would hold such an answer not falsified by the facts. But, on the other hand, it has been held that when the policy, or the application, contains the clause quoted above, to the effect that if the answers are untrue in any particular, the policy shall be void, that this gives to the statements the full force of warranties, and the policy will thereby be avoided, whether the answers are material or immaterial: *Miles vs. Conn. Ins. Co.*, 3 Gray, 580; *Cazenore vs. British Association Co.*, 6 C. & B., 437. It may well be doubted whether these decisions can be regarded as safe precedents.

In the case of *Wise vs. Mut. Benefit Life Ins. Co.*, 34 Maryland, 582, the plaintiff had been asked, "Has the party had any sickness in the last ten years, and if so what?" to this, answer was made "Pneumonia in 1862." On the trial proof was made that the in-

sured, in 1860 (within ten years,) had a slight attack of Chronic Pharyngitis. He was also asked, "Has any company declined to insure the party." The answer was, "No." The proof showed that he had been examined for insurance and the physician had certified to his good health, but "that his weight was below the standard of the company;" that his application had been forwarded by a home agent to the company without his knowledge, but had been withdrawn, but not by him. This question was also put "Has the party been or is he now employed in any military or naval service?" Answer "No." There was some evidence that Wise had been a chaplain in the Confederate army. This was very indefinite. The policy issued contained a clause to the effect that the answers are the basis of the contract, and if the same are in any respect untrue the policy should be annulled.

Whether the answers were warranties or representations does not seem to be much discussed; the court seems to treat them as rather technical, but indicates that the whole instrument is to be construed with reference to the subject matter. The learned reader is referred to the case of *Anderson vs. Fitzgerald*, 4 House of Lords, Cas., 484, for the present English view of the subject; and to the case of *Campbell vs. New England Mut. Life Ins. Co.*, 98 Mass., 381, for a very full and learned exposition of the American view.

There seems to be no doubt that fraudulent representations, though in fact not material, yet material in the judgment of the insurer and which induce him to take the risk, will avoid the policy: 20 N. Y., (6 Smith,) 32.

Questions of distinction between warranties and representations, between material and immaterial answers, are so numerous, involving such nice discriminations, that it would extend this article to an unwarrantable extent to even point them out, and we shall conclude this branch of the subject by recommending to all persons desiring insurance to answer all the questions propounded, truthfully, upon belief and best knowledge.

The next question which naturally arises is, what is an insurable interest?

A man may insure his own life, for the benefit of his own estate, for the benefit of his wife, or his children, or for the benefit of a third person; for his creditor, for his creditor in part, balance to go elsewhere; may dispose of the policy by his will, or assign the same, and the assignee recover without regard to the consideration he paid for the same. A wife may take out a policy on the life of her hus-

band; a creditor upon the life of his debtor; a father upon the life of his infant son, or the latter upon the life of the former. Courts have given such liberal construction to the rule requiring an interest, that it may be now said that wherever there is now a dependence of one person upon another the person so dependent has an insurable interest on the life of the other.

The following cases will indicate the limitations upon which the soundness of the foregoing general proposition depends, and the reasons that have influenced the courts.

One of the earliest cases in the United States, was that of *Nancy, Lord vs. Wm. Dale*, 12 Mass., 115. The facts may be briefly stated; viz: Jabez Lord, aged thirty-three years, was about to sail on a voyage, his sister, the plaintiff, being a person of no property and dependent upon her brother for support and education, (he having before that provided her with clothing and education,) took out a policy for her own benefit, for the sum of \$5000 upon his life. He was allowed by the policy to proceed to South America or any other place he chose, from Boston. Jabez died on the coast of Africa, during the term of the insurance, being engaged in the slave trade—an illegal traffic. Objections made to plaintiff's recovery were:

1. That she had no insurable interest.
2. That there was a concealment of the intention of Jabez to sail to the coast of Africa.
3. That the policy was void, it being to secure the life of Jabez while in the execution of an unlawful enterprise.

Parker, C. J., says in substance: "But it is said the interest must be a pecuniary—a legal interest—to make the insurance valid—one that can be noticed and protected by the law—such an interest as the creditor has in the life of his debtor, a child in that of a parent." Having thus clearly stated the exact question, he rules against it.

On the third proposition he states: "We do not think it can prevail to the prejudice of the plaintiff, who did not participate in the illegal employment; and, indeed, does not appear to have known of it."

This case on the first point is well sustained by the Court of Appeals of New York, in a case reported in 2 (E. D.) Smith, 263, and also the following cases: *Loomis vs. Eagle Life and Health Ins. Co.*, 6 Gray, 396; *Mitchell vs. Union Ins. Co.*, 45 Maine, 104; and the cases cited in this opinion. The Supreme Court of New Jersey, in *Trenton Mut. Life Ins. Co. vs. Johnson*, 4 Zabriskie, 576, goes a step farther and declares, "It is not necessary for the plaintiff to prove

an insurable interest in the life insured, but if any interest were necessary it need not be such as to constitute any direct claim upon the insured; it is sufficient if any indirect advantage may result." In this case the policy was taken out by the plaintiff Johnson, and the life insured (Middlesworth) jointly, for the sum of \$1000, for the use, benefit and account of Johnson, to the amount of five hundred dollars, and the declaration alledged that Johnson had a large interest in the life of M., to the amount of five hundred dollars. This interest was averred to arise as follows: Johnson and the life insured, with other persons, had entered into an association, called the New Brunswick and California Mining and Trading Company, the capital stock of which consisted of forty-five shares of six hundred dollars each. Each shareholder was an active member and was required by the articles to proceed to the mines or furnish a substitute. The plaintiff owned one share, for which he had advanced six hundred dollars, and procured the life insured to go out as his substitute, which he did, and received the plaintiff's share of the profits, dying before he paid them over. The following defenses were insisted upon :

1. That the contract of insurance was one of security or indemnity, and that the plaintiff below failed to show an interest in the life insured to the extent of five hundred dollars. In support of this the case of *Godsall vs. Balden*, 9 East, 72, was referred to, (which case has since been overruled by *Dally vs. India and Life*, 15 Conn., B., 365.)

The court replies, that the case of *Godshall vs. Balden* went off on the statute of 4 Geo., 11, s. 48, which enacts that "no insurance shall be made on the life of any person wherein the person for whose benefit such policy shall be made shall have no interest, and that in all cases where the insured hath an interest in the life insured, no greater sum shall be recovered or received for the insurer than the amount or value of the interest of the insured in such life." This statute not extending into Ireland, the courts of that country had recently held that at the common law policies of insurance are valid without any interest, citing *Ferguson vs. Lomax*, 2 Dru. & War., 120; *Brit. Ins. Co. vs. Magee Cook & Co. et al.*, 182; *Scott vs. Noose, Long & Town*, Ire., R., 54; *Shannon vs. Nugent*, 1 Hayes, (Ire., R.,) 536, that no such statute existed in New Jersey; that until the State should pass a statute against wager policies, a contract for such a policy could be good, citing *Crawford vs. Hunter*, 8 Tenn., 13; *Buchanan vs. Ocean Ins. Co.*, 6 Cowan, 318; *Earl of*



*Chesterfield vs. Jamson*, 1 Atk., 346 ; 2 Ves., 25 ; *March vs. Piget*, 5 Bun., 2803 ; 19 Ves., 628 ; 2 Sim., 7 ; *Barber vs. Morris*, 1 Moo. & R., 66—the latter case showing that the English statute is disregarded by the companies, and that they now pay without inquiring as to the interest: *Bunger* 23. So we may now regard it as settled, that the interest need not be a direct pecuniary interest, such as the law would infer from the relation of debtor and creditor or a pecuniary interest of any character, but a dependence, not legal, but which existed by relation and consent.

Is a life policy one of indemnity and security? In the case of *Dalby vs. India & London Life Assurance Co.*, 15 C. B., 365, a creditor had taken out a policy upon the life of his debtor, and was paid before the death of the debtor, the court, after holding that the policy was not one of indemnity and security, say “it is a contract to pay a certain sum on the happening of a certain event, and being valid at the time it was entered into, the fact that the relation of creditor and debtor ceased before the death of the latter, does not invalidate it. The premium paid by the creditors is the equivalent for the risk taken, and the company’s rates are not increased or diminished by the facts, and bear no relation to the interest.

The case of *King vs. Mutual Ins. Co.*, 7 Cushing, 1, presents the same question. A mortgagee of real estate had taken a policy on the life of the mortgagor. On the death of the latter, the company insisted that, as the proceeds of the policy would go to pay the mortgage debt, in whole or in part, and to that extent extinguish it, therefore the company would be equitably entitled to an assignment of a proportionate part of the mortgage debt. The court held that such separate insurance was a distinct collateral contract, which the assured had the right to make for his own use, and that the payment of the loss did not operate as a payment of the mortgage debt.

May a party take an insurance upon his life for the benefit of any third party ?

It has been held that a debtor may insure his life for the benefit of his creditor, in a sum exceeding the amount of the debt, the balance to enure to the benefit of his widow, 26 Penn., 189. The court say, “We see no good reason why a man, having an insurable interest, may not insure it and present the policy, as a gift, to a friend, and if so, why may not the name of the friend be inserted ?” So, it has been held that an action may be maintained on a policy of life insurance, taken out by a man upon his own life, without proving an

insurable interest therein in the person for whose benefit it purports to be made.

In the case of an insurance for the benefit of another, it should be made to appear that the transaction was *bona fide*, and not a mere loan of a name for gaming purposes. Good faith is of the utmost consequence in such a transaction.

What may a life-insured do with his policy?

A policy of insurance is a chose in action: 1 Sneed, 444, and as such may be assigned: 3 Sneed, 565; 2 Parsons on Contracts, 481. It may be agreed to be assignable, or assignable on condition, such as notice to the company; these latter are construed more strictly against the company. Some policies are made to be assigned—*Id.* This matter is, however, usually determined by the terms of the policy. A policy of insurance may be the subject of a *donatio mortis causa*, 1 Best. & S., 109, Queen's Bench.

A husband assigned a policy made payable to himself, to his creditor as collateral security for a debt; the creditor paid the premium after the assignment; upon the death of the husband the widow and children filed their bill claiming the whole amount. This claim was rested upon a statute of Tennessee, passed in 1846, to the effect that any insurance effected by the husband upon his life, "the same shall in all cases enure to the benefit of the widow and heirs, on the present rates of distribution, without being in any manner subject to the debts of said husband." *Held*, 1st. Said act did not deprive the husband of the power to assign or otherwise dispose of said policy during his lifetime. 2, That the proceeds belonged to the creditor to the amount of his debt and payments of premiums and interest, but that the surplus belonged to the widow and heirs.

If a husband has taken out an insurance upon his life for the benefit of his wife or his legal representatives, and had paid the premium himself, held that having survived his wife, he could dispose of his policy by will; 23 Wis., 108. It seems that if a party effects an insurance upon his own life for the benefit of another and himself pays the premiums, he may do anything he pleases with it, the company assenting: *Clark vs. Durand*, 12 Wis., 223; *Godsall vs. Webb*, 2 Keen, 99, (15 Eng. Ch., 100;) Angell on Fire and Life Ins. chapter 16. No such interest vests in the beneficiary, until death, which could forbid the insured from exercising dominion over it. He can refuse to keep it alive by discontinuing to pay the premiums, and let the policy lapse. It is an unexecuted gratuity and voluntary

provision, that vests no interest. Not so, however, where the other party pays the premium. *Eddie vs. Slimmon*, 26 N. Y., 9, or the statute of the State, is otherwise, and directs how the proceeds shall go: *Gould vs. Emerson*, 99 Mass., 154.

What acts of the insured will render the policy void?

1st. Failure to pay premiums at the time due.

2d. Following forbidden occupations.

3d. Dying in the hand of justice, or killed in the commission of crime, or in a duel, or from intemperance.

4th. Going, without a permit just had, into another distinct State or country.

A failure to pay the premium at the time the same is due, if so expressed in the contract, forfeits the policy: *Pitt vs. Berkshire Life Ins.*, 100 Mass., 500. Likewise, for a failure to pay installments, (*Id.*;) act of God will not excuse; *Howell vs. Knickerbocker Life Ins. Co.*, 44 N. Y., 276; company not bound to give notice of the maturity of the premium note; *Robert vs. New England Mutual Life*, 2 Disney (Ohio,) 106; non-payment caused by, was held good; *New York Life vs. Clopton*, 7 Bush, (Ky.,) 179; payment in Confederate money valid: *Robinson vs. International*, 4 N. Y., 54.

Payments may be waived—when: If agent accepts overdue payment and accounts for it to his company; and is received without inquiry, it is a waiver: *Holsden vs. Guardian Life*, 97 Mass., 144; *Bouton vs. American Mut. Life*, 25 Conn., 542. Extension of the time of payment is a waiver: 8 Abbott Pr. N. Y., 144.

Some occupations are more dangerous than others; and some companies consider certain occupations so hazardous to life that they will take no risks upon such, viz: service in the army or navy. And for similar reasons, a higher rate will be charged upon the life of a person following one occupation than upon the life of another who follows a less dangerous occupation; and for this and other reasons, the occupation should be truthfully declared, otherwise the policy will be avoided. In *Hartman vs. Keystone Ins. Co.*, 21 Penn., 466, the insured declared himself a farmer, and it was proved on the trial that his real business was that of catching slaves escaping from Maryland into Pennsylvania. Slave-catching being proved to be more hazardous than farming, the court say, "if it (the representation) was wilfully made it was a fraud, and if made ignorantly or by mistake, it was a warranty by the express terms of the policy." The insured committed suicide the same day upon which he took out the policy. It was insisted in the argument that, as the deceased did

not come to his death from any cause connected with the subject of the misrepresentation (slave-catching) that the representation was immaterial. The court, in reply, say: "Every fact is material which increases the risk, or which if disclosed would have been a fair reason for demanding a higher premium. One who falsely declares himself free from consumption cannot effect a valid insurance on his own life, though he die of cholera. A soldier or a sailor who warrants himself to be a merchant has a void policy, even though he is not slain in battle, or does not perish at sea. In such cases the whole contract is void as much as if it had never been made, and, of course, it can not derive any force or validity from a subsequent event." In the argument the cases of *Clark vs. Manufacturers' Ins. Co.*, 8 How., 235; 2 Pet., 25, and 10 Pet., 557, were cited as deciding contrary, when Black, Judge, distinguishes between them. In *Perrins vs. Marine &c., Ins. Co.*, 2 El. & El., 317, the insured was required to give his profession or occupation. He filled up the form thus: "J. T. P., Esq., Saltley Hall, Warwickshire." It was proven on the trial that he lived at Saltley Hall, but that he kept an ironmonger's shop in the same county; it was shown that by his policy, the premium would have been no greater if he had made a full disclosure: *Held*, That the policy was not avoided. Black, Judge, in the Pennsylvania case cited, says the true rule is, that the applicant should disclose that business in which he was engaged at the time he made his application. It will be a pertinent enquiry just here, what would be the effect if he should change his occupation to a more hazardous one and die while pursuing the latter, or die subsequently to the time that he had followed the latter, and from a cause not attributable to it, whether the representation of an occupation is a warranty that the insured will not in the future engage in any other, or any other more hazardous to the company.

The case of *Summers vs. United States Insurance Company*, 13 Louisiana, An., 504, the plaintiff insured a negro and represented him as a laborer in a tobacco warehouse, subsequently he put him upon a steamboat, to be taken to a sugar plantation, north of New Orleans, at one of the landings. Before he reached his destination he attempted to walk a stage plank to the shore, and was drowned. The company rested its defense upon the ground that working upon a sugar plantation was an increase of the risk, it being a more dangerous occupation than working in a warehouse. The court say: "Conceding that employment on a sugar plantation is more hazardous than employment in a tobacco warehouse, still the slave was not

lost whilst working thereupon. He had not reached the plantation. If a policy should agree what were insurable occupations, or what occupations increased the hazard, and for which a higher premium would be demanded, and the insured should turn to one of these, we suspect, in the absence of any adjudicated case, that it would avoid the policy.

Dying by the hands of justice, or killed in the commission of a crime, or in a duel, or from intemperance.

If a person, having an insurance upon his life, commit a felony, for which he is tried, convicted and executed, the policy is rendered void. *Amicable Society vs. Boland*, (4 Bligh., N. S., 194; 2 Dow. & C., 1.) This would be so, though the policy contain no condition to this effect: (Same.) Wood, V. C., in the case of *Horn vs. Anglo Australian, &c., Ins. Co.*, 7 Ins., (N. S.,) 673, seems to have inclined to the opinion that suicide committed by a sane person (being a crime) would avoid the policy.

"Killed in the commission of a crime," or "in the known violation of any law." The cases arising under the foregoing character of clauses are not very numerous, but are quite important to the insured. The case of *Bradly vs. Mutual Benefit Life Insurance Company*, 3 Tansing, 341, presents the case. The insured lived in Louisiana, Cox owed him some money. He met Cox and demanded payment. Cox refused. He then told Cox he would take his horses. Cox replied, "You had better try it." The insured then commenced unhitching the horses, and was shot and killed. The action was brought in New York. There was no proof on the point as to what was the legal offense committed by the insured at the time he was killed by the laws of Louisiana. The Supreme Court held that he died in the known violation of law, and therefore could not recover. This case was afterwards reversed in the Court of Appeals, in 1871; and in the opinion of the learned Judge, the cases of *Cluff vs. Mutual Benefit Life Insurance Company*, 13 Allen, 308; 5 C., 99 Mass., 318; *Harper et al. vs. Phœnix Insurance Company*, 19 Missouri, 506; and 39 Missouri, 122; 4 Seld., 299, were referred to and discussed; and this distinction pointed out, viz: That the decisions in Massachusetts and Missouri went upon the idea that the proviso applies only to violations of the criminal law, and does not embrace all illegal acts of such a character as may lead to violence and death. The latter being the law of New York, the court, without discussing the merits of the distinction, place the reason of the reversal upon this ground, viz: That the proof showed that Cox did not kill

Cluff (the insured) in consequence of Cluff's illegal seizure of his horses, but in consequence of blows and insults that intervened, and this point was not submitted to the jury, as it should have been. The evidence exhibited great conflict as to what was the immediate cause of the fatal shot, holding that the proximate and not the remote cause must be regarded. That if the shot of Cox was wholly beyond the scope of lawful resistance to the trespass of Cluff, and the provocation given by the latter was totally inadequate, and the killing was attributable rather to wanton malice than to an honest endeavor to resist aggression upon his property or self, then, although Cluff was wrong in the first instance, his wrong was but a remote and not a proximate cause of his death. The case in 13 Allen, 308, arose upon the same circumstance, and the same homicide, and the learned Judge who gave in the opinion of the court, says that such provisos "do not extend to mere trespasses against property or other infringements of civil laws to which no criminal consequences attach."

The two Missouri cases conclude the discussion on this point, by declaring that the proviso "extends only to instances in which the party died (or received his fatal wound) in the consummation of a felony." No stress seems to have been laid upon the word *crime* as distinguished from *misdemeanor*, a distinction which is made by the statutes of some of the States. This branch of the subject is especially important to persons who have taken out policies. If it should be held that persons dying from causes which amount to a technical trespass, or to a mere statutory misdemeanor can not recover upon their policies, then the whole system amounts to but little, and to save litigation these matters should be understood between the parties, and disposed of in the policies. In Tennessee, it is a misdemeanor to run a horse race along a public road, or to have a shooting match nearer than a certain distance to such a road, or to follow an ordinary occupation on the Sabbath, together with many other acts. Now if the insured should die or be mortally wounded or injured while engaged in any of these, will this, or a similar proviso, forbid a recovery?

"Die by suicide," or "death by his own hands." Do these two expressions mean the same? Some policies contain both provisos, and in such cases some of the courts have given them different meanings, holding that as under previous decisions persons who had slain themselves, while in a state of insanity, had not in legal contemplation committed the crime of suicide for want of capacity; and therefore such could recover upon their policies; that the introduction of

this latter clause was intended to cover all cases of self-slaughter, no matter under what circumstances committed. It is submitted, however, that a review of the decided cases will not support such a distinction, and will show that the same construction should be given to each, and that it is superfluous to insert both in the same policy.

A policy containing such provisos is not rendered void, if the deceased killed himself while insane.

How much capacity the deceased had at the time he committed the act, has become a nice question.

Self-destruction, by one conscious of the act he was committing, who intended to take his life, and who was capable of understanding the nature and consequence of it, will annul the policy.

But if the insured destroyed himself while acting under an insane delusion which overpowered his understanding and will, or if he was impelled by an uncontrollable impulse to do the act, the company is liable: *Guy vs. The Union Mutual Insurance Company*, (United States Circuit Court for Connecticut, 1871,) 55 Scott, N. H., 418; 4 Allen, 96; 54 Maine, 224; 102 Mass., 227. The American doctrine may now be stated to be that the policy is only avoided when the act in a case of insanity was committed intentionally, and with a full knowledge of its nature and consequences.

E. H. EAST.



## BANK CHECKS.

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The attempt of Judge Cowen, in the well known case of *Harker vs. Anderson*, 21 Wend., 372, to show that bank checks are bills of exchange, and nothing more, and hence in all things subject to the same rules of law, received but little favor from the profession, and it is now well settled that these instruments constitute a class *sui generis*, subject to rules different in many important regards, from those applicable to other classes of negotiable paper. These rules have for the most part, by well considered cases, been rendered perspicuous, and of easy application; so that at this day, the practicing lawyer is rarely at a loss for a case in point as to any matter in this branch of the law he may have in hand.

But, before he begins to cite these "well considered cases," and apply "these perspicuous rules," it behooves him well to consider whether the instrument in question is in fact a bank check. The writer of this article, from an experience of which to say the least he has no pleasant recollection, knows that *hic labor hoc opus est*. For despite the labors of Kent, Story, Parsons, and others, it must in the light of adjudicated cases be confessed that no crucial test has hitherto been discovered by the application of which the profession may in all instances, distinguish with certainty a bank check from a bill of exchange.

It has been well said that a good definition "fences in all that belongs to the thing defined, and fences out all that does not." If this is true, it may with confidence be said that no good definition of a bank check has yet been given, for it may be shown that all heretofore suggested either by their terms embrace many instruments confessedly bills of exchange, or exclude many held to be bank checks by the most respectable courts.

A few cases may be cited to illustrate this position.

"A check on a bank is, in legal effect, an inland bill of exchange, drawn on a banker, payable to bearer on demand:" Byles on Bills, side p. 10.

This may, perhaps, be a sufficient definition of a bank check, as at present defined by acts of the British parliament. It will at once, however, be seen that it falls far short of giving an adequate idea of the instrument as known in America. For to go no further, it in

terms excludes all instruments payable to a man or his order, and all drawn in one State upon a bank or banker in another, the latter class, if bills of exchange at all, being foreign bills: *Gardner vs. Bank of Tennessee*, 1 Swan, 420; 1 Pars. Notes and Bills, 642, and authorities there cited.

"A check," says Parsons, "is a brief draft or order on a bank or banking house, directing it to pay a certain sum of money:" 2 Pars. Notes and Bills, 57.

This definition is certainly broad enough to embrace every conceivable bank check, but it wants the second requisite of a good definition, in that it does not exclude all instruments not bank checks. For in the first place, no reason is perceived why a bill of exchange may not be drawn upon and accepted by a bank or banking house. And in point of fact, many instruments drawn upon banks directing them to pay a certain sum of money have been held to be bills of exchange: *Morrison vs. Bailey & Burgess*, 5 O. S., 13; *Brown vs. Newell*, 8 N. Y., 190; *Woodruff vs. Merchants' Bank*, 25 Wend., 673; (S. C., in error,) 6 Hill, 174; *Brown vs. Lusk*, 4 Yer., 210.

The instruments held in all the above cited and many similar cases to be bills of exchange, are embraced by the very terms of the above definition of a bank check.

"A check," says Story, "is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay, on presentment, to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument:" Story's Prom. Notes, s. 487.

This definition differs more in appearance than in fact, from that given by Parsons. For in the first place, the words "*on presentment*," were not understood by Judge Story to exclude instruments payable on a day certain after date. He himself held the following paper to be a bank check:

GRANITE BANK, \$703.50.	BOSTON, April 18, 1841.
Pay to Custis & Co., 18th May, or bearer, seven hundred, three dollars and fifty cents.	
To Cashier.	EPHRAIM BROWN.

—*Matter of Brown*, 2 Sto. R., 502.

In the second place the words "*having money in their hands*," can serve no useful purpose as parts of a definition, and so Judge Story seems to have felt in the above case, when, as a matter of fact there was no money in bank to meet the draft, and yet he held it a bank check. In that case he says:

"It is commonly, though not always, payable to the bearer, but I conceive it to be still a check if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually, also, made payable on demand, though I am not aware that this is an essential requisite. The distinguishing characteristics of checks as contradistinguished from bills of exchange are, (as it seems to me,) that they are always drawn on a bank or banker; that they are payable immediately on presentment without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment."

Yet the hard-worked lawyer imagines himself endeavoring to extract from this learned exposition of "contradistinguishing characteristics," a single feature by which he may be enabled to advise his client whether a particular instrument is or is not a bank check! After such an attempt, no doubt, he will most heartily concur in the just criticism of Judge Johnson upon this passage: "Of all these characteristics, the only one that can serve any purpose in determining whether any particular instrument is a check or a bill of exchange is, that it is drawn upon a bank or banker. The others may or may not be legal qualities which belong to checks, *after they are ascertained to be checks*, but do not aid in determining their character:" *Bowlin vs. Newell*, 8 N. Y., 195.

And even the single *characteristic* of being "drawn upon a bank or banker," miserably fails us in time of need, as we have seen.

But so great is the weight of Story's name, or perhaps so great is the inherent difficulty of defining a bank check, we still find judges substituting the legal qualities of instruments, ascertained to be bank checks, for a definition by which it may in the first instance be ascertained whether the instrument is such an one as that these legal qualities may properly be predicated of it; *vide Merchants' Bank vs. State Bank*, 10 Wall., 647, cited with high approval by the Supreme Court of Tennessee in *Herring et al. vs. Kiser*, MS., of December Term, 1871.

When we are anxiously inquiring whether an instrument is or is not a bank check, it is hardly relevant to tell us, as the learned judges do, that a bank check has no days of grace, needs not to be presented for acceptance, requires no protest to bind the drawer, and is an absolute appropriation of so much money in the hands of the banker to the holder of the check. This last named "characteristic" is often much insisted on; but the learned judges have failed to inform us how the drawing of a check is in any comprehensible manner a legal appropriation of funds, while it is well settled by an over-

whelming weight of authority, that the holder acquires no lien and can maintain no action against the banker before the check is accepted: 2 Pars. Notes and Bills, 61, and authorities there collected in note J.

And if it should be said that the appropriation intended is a kind of moral obligation on the part of the drawer to permit the funds to remain in bank until called for by the holder, we should answer that it is difficult to see how this can serve as a specific characteristic of a check, for precisely the same moral obligation rests upon the drawer of a bill drawn against funds.

But of all the "contradistinguishing characteristics" suggested, none seems to us more utterly nugatory than that the check is always drawn against a previous deposit of funds. For, first, bills of exchange may undoubtedly be drawn against funds, and so this characteristic fails to distinguish a check. And secondly, the existence of a previous deposit can be ascertained only when demand is properly made, and when ordinarily, for all practical purposes, the knowledge is of no avail; for if the draft should in the end turn out to be a bill, a failure to have recognized that fact and to have made demand, and given notice according to the strictness of the law merchant, would be fatal.

To state the matter briefly, the holder can not tell whether his draft has been drawn against funds used herein, whether it is a bill or check, until he has made demand; and he can not tell when to make demand until he knows whether his draft is a bill or check.

Another curious result follows from taking the existence of a previous deposit of funds to be a distinguishing feature of checks. If a draft upon a bank is drawn payable on a specified day after date, and there are no funds deposited, but no fraud in fact, the draft is a bill, and the demand must be made and notice given with strictness: *Brown vs. Lusk*, 4 Yer., 210.

But if there were in fact funds, the draft is a check, and such strictness is not required—thus showing greater consideration for the man who would not probably be injured by want of notice than for him who probably would be. To this complexion have matters arrived, at least in Tennessee, as we shall more fully see hereafter.

In the case of *Chapman vs. White*, decided by the Court of Appeals of New York, (6 N. Y., 412,) in July, 1852, Judge Edmonds dissenting from his brethren, says: "These incidents characterize a check: It must always be drawn on a banker; it must be payable on demand; it has no days of grace; and it need not be presented for

acceptance, and consequently no protest for non-acceptance is necessary to hold the drawer. If any one of these incidents is wanting, the instrument is not a check, but if all unite, it is:" *Ib.*, 418.

It will be seen that the learned judge did not regard the "previous deposit of funds" to be drawn against as a necessary incident to a check. Disregarding for reasons above suggested what is said with regard to days of grace, and presentment for acceptance and protest, this definition is in substance, "a bank check is a draft upon a bank or banker, payable on demand." And yet this definition, the most reasonable and practical yet suggested, fails in the light of the cases, even with the explanation that a draft payable on a specified day after date, is "payable on demand."

After an examination of all the authorities within his reach, the writer of this article is satisfied that in many cases no lawyer can venture to say from an inspection of a given paper whether it is a bank check or a bill of exchange; while in most cases, after all of the facts have been developed, and the rights of his client have been fixed, he may, by a sort of *post mortem* examination, show most scientifically exactly how the paper died, and what remedies would have preserved it alive. But, after all, a *post mortem* diagnosis, however accurately scientific, must be a miserable comfort to the friends of the deceased.

Two important cases upon this subject were decided by the Supreme Court of Tennessee at its December Term, 1871; but whether they will tend to the settlement, or the still further complication of this vexed question, remains to be seen.

In the first of these cases, the following draft was held to be a bank check:

PLANTERS BANK OF TENNESSEE.

[Original.]

Office at Clarksville, Feb. 15, 1862.

\$1,000.00.  
and dollars.

Pay to the order of Joshua M. Rice, one thousand dollars.  
W. J. HUME, Cashier.

*To the Cashier of the Union Bank of Louisiana, New Orleans.*

Fort Donelson, situated but a few miles from Clarksville, was then being attacked by the Federal army. It had already become evident that Clarksville would in a few days pass into the hands of this army. The Planters Bank notified its customers to withdraw their deposits, and offered them the option of such funds as the bank had, or drafts upon the Union Bank of Louisiana. The Planters Bank had, for many years, kept a very large sum of money with the Union Bank, for the purpose, it was argued, of facilitating its dealings in exchange. Joshua M. Rice chose to receive payment of his deposits in *drafts* upon the Union Bank. These drafts were assigned to various par-

ties, and one of them fell into the hands of the plaintiff's intestate. It was presented for payment in March, 1864. Payment was refused, but no notice was given to the bank. The draft would have been paid if presented at any time prior to September, 1863.

It was urged in this case, that the draft was in form and in fact a foreign bill of exchange, and was taken, not as a mere means of receiving payment, but primarily to remove funds from an unsafe to a safe place, and in the meantime to pass as money, by indorsement, from hand to hand. But the court was of opinion that the draft was a bank check.

The fact that the draft was made upon a previous deposit of funds seems to have been deemed conclusive. Nicholson, C. J., said: "The instrument sued on falls within the general definition of a draft or bill of exchange. It is a written order or request by the Planters Bank to the Union Bank, for the payment of \$1,000, absolutely and at all events. But as it is drawn upon *a deposit in a bank*, it falls directly within that class of bills of exchange known in the commercial world as checks:" *Planters Bank vs. Kesse*; *Same vs. Merritt*, adm'r.

The following instrument was also at the same term of the court, declared a bank check:

CLARKSVILLE, TENN., March 11, 1865.

Ten days after sight, pay to the order of E. Withers, two thousand dollars.

In currency—value received, and charge same to account.

B. O. KESEE, *per* GEO. B. FAXON, Cashier.

*To Sturgeon, Clements & Co., Louisville, Ky.*

Kesee had in the hands of Sturgeon, Clements & Co., who were bankers, \$934.64, in currency, and \$2,527.32, in gold, and they were ordered to sell gold when necessary to procure currency to meet drafts. The draft was presented for acceptance, and was accepted by Sturgeon, Clements & Co., on the 15th of March.

McFarland, Judge, delivering the opinion of the court, said: "Without entering fully into a discussion of the authorities, for they are numerous, it will be sufficient to say that the mere fact that the paper is drawn payable at a future day, or so many days after sight, does not necessarily establish that it is not a check. There are other considerations affecting the question. If it is drawn upon a bank or bankers, and is designed by the parties as an absolute transfer and appropriation to the holder of so much of an actually existing fund belonging to the drawer, and in the hands of the drawee, it will in general be regarded as a check, and not a bill of exchange." He says that in *Brown vs. Lusk*, 4 Yer., "the drawer had no funds in

the bank upon which he drew, and this was probably the distinguishing feature in that case:" *Herring et als. vs. Kesee*, MS. op., Dec., 1871.

This case, if it does not go the length of holding that every draft upon a bank or banker is a check, certainly renders it impossible for any one to decide from the face of the paper itself what the instrument in contemplation of law is. It may be that the authorities are numerous upon this point, but so far as the writer's reading has extended, this case stands alone in holding that an instrument drawn payable so many days *after sight* is a check.

It seems too to be going far to say, that there is an absolute transfer and appropriation of an actually existing fund, when in fact the fund, viz., currency, had to be provided by the sale of the gold. One would naturally suppose that the obvious intent of making the draft payable so many days after sight was to give the drawees time to provide the fund.

It is curious to see how utterly in this case, the old distinguishing feature of a check, viz., that it is payable on demand, is lost sight of.

Upon the whole, the profession in Tennessee may congratulate themselves upon the fact that these two cases, if they should be followed, will go far towards establishing the crucial test we have been vainly searching, and we may safely advise our clients that every draft upon a bank is a bank check, unless the drawer should take the precaution to write across its face, "this is a bill of exchange."

THOS. H. MALONE.



## R O M A N   L A W.

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The writer, then young in his profession, published many years ago in *DeBow's Review*, an article on the Civil Law, and the mode of prosecuting its study. Since then, his own opportunities for understanding the subject have been better, and it has occurred to him that the re-publication of his juvenile essay, with such changes and additions as experience would naturally suggest, would not be foreign to the purposes of this review, and might be of some service to the new generation of law students. The merits of the Civil Law, and the advantages to be derived from its study, are more highly appreciated at this day than then. Outside of the stores of legal knowledge to be acquired, there can be no doubt that the mind is expanded, and the intellect sharpened by its study. The multiplicity of decisions by the courts of the various States, and of the United States, many of them directly in conflict with each other, must result in compelling the judges to rely less upon precedent, and more upon abstract reasoning. In that event, the aim of the lawyer will be not to find a case in point, but a satisfactory reason for the position he assumes. Memory will lose some of its present importance, and logical and discriminating intellect be more in demand. The *Corpus Juris Civilis* will then be studied with all the ardor that is said to have followed its discovery at Amalfi. It will, indeed, be a glorious era for the science of the law when Papinian and Ulpian shall be of equal authority with Hardwicke and Mansfield, and Pothier and Savigny shall be quoted with Kent and Story. That would be the beginning of the legal millenium predicted by Cicero, when there would be one law, "*Sempiterna et immortalis*," for all nations and all times; and when, to follow out the idea of the same great lawyer, the science of jurisprudence will be drawn, not from the Twelve Tables, nor the edicts of the Pretors, nor the precedents of the past, nor the local customs of the present, but out of the very depths of philosophy, "*penitus ex intima philosophia!*"

"Laws," says Montesquieu, (*Esprit des Lois*), "in their most extensive signification, are the necessary relations which spring from the nature of things. And, in this sense, all beings have their laws: Divinity has His laws, the material world its laws, the brute creatures their laws, man his laws. It is an absurdity to suppose that

blind fatality has produced these relations. There is a primitive reason; and laws are the relations between it and different beings, and the relations of these different beings among themselves." In this view, the nearer we can approach to the primitive reason, consistently with the nature of the beings we are legislating for, not merely with reference to themselves, but to other beings, the more perfect will our system be. The first laws of every people must relate principally to themselves. It is only after intercourse with other peoples, and the expansion of view thereby produced, that the positive law, rude and simple, and based upon authority, *id quod jussum est*, gives place to the more enlarged rule of reason, and the law becomes *ars boni et æqui*, the embodiment of what is just and equitable. The cultivation of the intellect tends in this direction; but the study of the laws of other nations, and the comparison of different systems with a view to ascertain that which is common to all, is essential to work the change. Both the theory and the practice of the ancient Romans were in accord in this matter, and tended to the desired end. "It ought to be remarked," says Montesquieu in another work, (*Grandeur et Decadence des Romains*), "that what contributed most to make the Romans masters of the world, was, that having successively waged war against all people, they renounced their own usages as soon as they found better."

According to these philosophical suggestions, the division of the law by the Roman jurists into three kinds, is appropriate and happy: *Jus naturale*, *jus civile*, and *jus gentium*. By the first of these, *jus naturale*, they meant that law which is common to the whole animal creation—"quod natura omnia animalia docuit." (Inst. Tit., II.) By the second, *jus civile*, the positive enactments made by each people for its own government—"quod quisque populus ipse sibi jus constituit." (Inst. I., Tit. II., I.) By the third, *jus gentium*, they mean those rules which conform to abstract reason, which are so appropriate to the general condition and exigencies of human nature as to apply to every nation—"omni humano generi commune." (Inst. I., Tit. II., 2.) The *jus gentium* of the Roman jurists is, consequently, altogether different from, and must not be confounded with the modern understanding of the law of nations, which is confined to the rules and regulations that govern international intercourse. Accordingly, the Roman law attributes to the *jus gentium* most of the institutions and usages, the contracts and relative rights of men in a state of civilized society: "*Et ex hoc jure gentium, omnes pene contractus introducti sunt, ut emptio, venditio, locatio, conductio, societas, depositum, mutuum,*

*et alii innumerabiles.*" (Inst. I., II., 2.) By this law, in the language of the Pandects I., 9, nations are distinguished, kingdoms built up, the boundaries of fields determined, commercial systems established, and the various kinds of obligations regulated. It is contradistinguished from the positive law of the State, and is the application of reason and common sense to the complicated relations of man in a state of society.

In this view, the largest portion of every system of jurisprudence belongs to the *jus gentium*. As the intercourse between different nations increases, and becomes more intimate, the peculiarities of the positive law of each will give way to that which reason teaches should be common to all—"quod naturalis ratio apud omnes gentes constituit." Confined to a single system, the reasoning upon which judicial decisions are based, becomes technical and narrow. This has been remarkably exemplified in the common law of England. A system of law grew up so purely local, and so little consonant with natural reason, that it was the ridicule of the continental jurists, educated in the school of Cicero and Papinian, and is now, in many respects, unintelligible to the most indefatigable of the legal antiquaries of the English themselves. As long ago as 1757, Lord Mansfield said, in *Taylor vs. Horde*, 1 Burr, 110, in discussing one of Littleton and Lord Coke's favorite topics: "The precise definition of what constituted a *disseisin* which made the *disseisor* the tenant of the demandant's præcipe, though the right owner's entry was not taken away, was once well known, but is not now to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded."

The most perfect specimen of pure English law, in substance though not in language, was Littleton's Treatise on Tenures, upon which the vast erudition of Lord Coke was piled. How little of either the text or the commentary can be traced to the deductions of natural reason! And how infinitely less of either is law at this day, even in the British Isles, than any portion of the Roman Pandects of equal extent! The one was intended for a single gens and a temporary state of society; while the other contains the precepts of natural reason common to all men, and suitable to every period of social progress. Charles Butler, the learned editor of the latest edition of Coke upon Littleton, quotes in his preface the opinions of some of the civilians in regard to Littleton's Treatise, apparently with the view of showing how little they understood the work, and how much they were inclined to disparage this *chef d'oeuvre* of the common

law. One of these civilians, Gatzert, speaks of the book thus: "*Cæterum liber ob methodi brevitatem, argumentandi subtilitatem, atque dictorum ordinem, laudem omnino meretur; sed nec minus fatendum est, adeo sæpissime obscuritati bonum hominem studuisse, ut ænigmata maluisse, quam præcepta, tradere videatur.*" He gives due praise to the pregnant brevity, subtle discrimination and masterly arrangement of the author, but confesses that he seems sometimes to have studiously aimed at obscurity, as if he preferred enigmas to plain precepts. Gatzert also remarks, with some astonishment, the idolatry of the English lawyers for Littleton, "*ita parem abest, quin credant falli eum fuisse nescium,*"—they almost consider him infallible! The learned Hottoman, also quoted by Mr. Butler, is still less complimentary, for he speaks of it as a book "*quod Feudorum Anglicorum Jura expouuntur, ita incondite, absurde, et inconcinne scriptum, ut facile appareat, verissimum esse quod Polidorus Virgilius, in Anglica Historia, de jure Anglicano testatus est, stultitiam in eo libro, cum malitia et calumniandi studio, certare,*" so inelegantly, absurdly and inconsequently written, that it were hard to say whether it were more conspicuous for its folly or its artful sophisms. Mr. Butler's error in translating this passage, which was pointed out by Legare in one of his masterly articles in the *Southern Review*, shows, in a very striking manner, the ignorance among the ablest English lawyers of the language of the civilians. He gravely remarks: "Hottoman, if he had read it, (Littleton's *Tenures*,) might think it inelegant and absurd, but he could not think it *malicious* or indicative of a disposition to slander;" thus absurdly and inelegantly translating "*malitia et calumniandi studio.*"

"The other elementary writers of our law," says Legare, in the article just referred to, "the compilers of institutes, abridgments, etc., even down to the present day, are, with few exceptions, liable to the same criticism. The most that can be said of them is *par negotiis, neque supra*. None of them stand upon that 'vantage ground' of which Bolingbroke speaks. They are mere *pragmatici*, who treat their subject in a strictly technical manner, and whose whole system of logic consists of a case in point. They seem to dread nothing more than generalization, or the stating a proposition in the form of a theorem. They string together cases from which it is often difficult to extract any distinct, general principle, and which are determined to be analogous or otherwise, by circumstances comparatively immaterial. Let any one reflect upon the confusion into which the courts of England were betrayed in their attempts to

reconcile the necessity of words of perpetuity to carry the fee in a will, with the rule that the intention shall govern, and the figure which a digest of these decisions makes as part of a scientific system! Would it be believed that stress has been laid by grave lawyers upon the verbal distinction of "leaving issue" and "leaving issue behind," as if issue could be left anywhere else! Compare Chitty on Bills with Pothier's *Traite du Contrat de Change*, or any other elementary book in our law, with a corresponding treatise of that admirable writer, and it will be impossible to dispute the justness of the preceding observations. In a word, the remarks of a celebrated French jurist, Chancellor D'Aguesseau, in reference to the law of his own country, as it stood in his day, is entirely applicable to the appearance which our jurisprudence makes in these very inelegant and unphilosophical compilations. 'It seems to be a mass of irregularities and incoherencies, which consists rather in particular usages and occasional decisions, than in immutable principles, or in consequences deduced immediately from the rules of natural justice.'

To America belongs the honor of having first broken through the method of treating legal subjects, so long pursued in the mother country. We owe much to Chancellor Kent and Judge Story for their innovations on previous usages, and for their efforts to engraft the spirit of the Roman Codes upon the sturdy trunk of the common law. Their example has not been lost on the common lawyers on either side of the water, and has brought the study of the civilians into fashion. They have accomplished what neither the vast erudition of Lord Mansfield, nor the profound and elegant learning of Lord Stowell could effect, and have turned the attention of the English jurists to the merits of other systems than their own, and have given an impetus to the study of the conflict and parallelism of laws. Under their influence the lucid method, the subservience of precedent to principle, and the enlarged view of the spirit of law, so conspicuous in the civilians ancient and modern, are beginning to be adopted, or at least aimed at by subsequent writers. The asperities of the common law are being ameliorated by a judicious intermixture with a system, the result of the intellect of the greatest people the world has ever seen, working through a period of thirteen hundred years. We may hope for the time when the common and civil law shall be mutually rendered more perfect by the union of the superiorities of both, when the universal principles of justice to be found in either, will be blended and combined into one, and when a Code of law, more just and perfect than any separate system, shall

be formed by a combination of all that is admirable in each. Then, indeed, we may apply to the law the oft quoted expression of Lord Coke, that it is the "perfection of human reason," (Co. Litt., 97b., 232b.,) which seems so out of place in the cumbrous and uncouth law of real property as collected by that learned Judge. Then, too may become appropriate the repeated advice of the same learned writer, to study the reason of the law, (Co. Litt., 183b., 232b.,) for then there will be reason for such advice. Lord Coke's expression in relation to law being the perfection of human reason, can scarcely be dwelt on with much complacency by the common lawyers when taken in connection with the context. "*Nihil quod est contra rationem est licitum*," for reason is the life of the law; nay, the common law itself is nothing but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason, for *nemo nascitur artifex*." (Co. Litt., 97b.) It is not artificial reason, but natural reason that ought to prevail in legal systems. The entities and quiddities of medieval scholasticism were more than matched by the absurd technicalities and verbal quibblings of the common law. As a curious instance in point, where the nicety was, contrary to the general rule, turned to a good purpose, take the following case from an old Reporter: "Lamb was indicted for sorcery and witchcraft. Athow Serg. took this exception to the indictment, that it was *quod exercuit quasdam malas, execrabiles et diabolicas artes*, (Anglice,) witchcraft, which can not be, for there is no latin word signifying witchcraft, and the law of indictment was nice. And the indictment was quashed:" Lamb's case, Latch, 156. It is to be hoped that the era of a purer reason *naturalis ratio*, has dawned upon us. Under its continued reign, the believer in human progress may console himself with the belief that, at some period, however remote, the language of Cicero may be applicable to our law as a system: "*Nec erit alia lex Romae, alia Athænis, alia nunc, alia posthac, sed et omnes gentes, et omni tempore, una lex et sempiterna, et immortalis continebit*;" that, so far as general principles, at least, are concerned, there will not be one law for Maine and one for Louisiana, nor one law for this generation and another for that, but that the eternal and immutable principles of justice may, at all times and in every country, prevail!

Surprise has often been expressed that Rome should have built up so enlarged a system of jurisprudence. Many causes, however, contributed to this happy result. Time was an essential element in the problem. Modern investigation gives to Rome a much earlier date



than the one commonly received. Long before the mythic age of Romulus, a powerful nation must have occupied 'the site of ancient Rome. The Cyclopean remains of their remote predecessors were the admiration of the builders of the Coliseum, and still remain as wondrous monuments of this primeval race. The institutions of these earlier people were incorporated into the institutions of their successors, and these again modified during the lapse of subsequent centuries by Senatorial and popular enactments were condensed into the Twelve Tables. The foreign element in this memorable collection is confessedly small. Niebuhr emphatically remarks that the laws of the Twelve Tables were nothing more than the ancient statutes, customs and institutions consolidated. Maine, in his masterly work on ancient law, makes the same remark in equally explicit language. And all modern investigators of eminence, such as Gravina, Savigny, Gibbon, and Bonamy, have come to the same conclusion. If, then, we adopt the commonly received date of the building of the city as the commencement of the civil law, we have a period of thirteen centuries to the age of Justinian, as an approximation of its continuous existence. This single fact goes far to explain the perfection of the Roman law, when we consider the unquestionable capacity of the Roman mind. Her continuous career of victory and prosperity must, moreover, have aroused all Rome's latent talent. Success, perpetual and unexampled, intoxicated her people. That nation must, indeed, be dull which is not aroused by universal conquest. Man's mind, it is the remark the world over, expands with his circumstances and his responsibilities. And what influences the individual, it is natural to suppose, will influence in like manner, the collective body of individuals.

Maine, in the work already cited, attributes the perfection of the Roman law to the cause just suggested, in connection with the fact that the law was the only opening for the active intellect of the nation, except in war. "The proficiency of a given community in jurisprudence depends in the long run, on the same conditions as its progress in any other line of inquiry, and the chief of these are the proportion of the natural intellect devoted to it, and the length of time during which it is so devoted. Now, a combination of all the causes, direct and indirect, which contribute to the advancing and perfecting of a science continued to operate on the jurisprudence of Rome through the entire space between the Twelve Tables, and the severance of the two empires, and that not irregularly or at intervals, but in steadily increasing force, and constantly augmenting number.



\* \* To the close of the Republic the law was the sole field for all ability, except the special talent of a capacity for generalship." Maine's Ancient Law, p. 360-2.

One other remark may be added. Rome was emphatically a nation of law, and her people a law-abiding race. We boast, and with reason too, of the natural aptness of our Saxon sires for self-government, growing out of their inherent love of order. But even the self-reliant Saxon must yield to the stern old Latin. In rigid obedience to law, Rome stands pre-eminent above all nations—ancient or modern. The child owed abject submission to the father, the soldier to his general, the client to his patron, the slave to his master, even the debtor to his creditor. The parent had the unlimited disposal of the life or liberty of his offspring; the commander could decimate his soldiers for cowardice or disobedience; ingratitude to patrons was punished with death; the refractory slave could be crucified by his master; and even the unfortunate debtor, it would seem, could be bodily divided amongst his heartless Shylocks. No nation, of which we have any record, can show so strong an array of severe laws so submissively obeyed. And as her people knew how to obey, so they knew how to create law. Their strong and masculine intellect was at home in the contests of the comitia, and the struggles of the forum. However inferior to other races in other respects, here Rome stands confessedly superior. Though her audiences at the amphitheatres may have been amused by the wit borrowed from the Attic stage, though her artists may have faintly copied the divine forms and glowing colors of Hellenic genius, though her epic may have been but an echo of the great Mæonian, and her entire poetry not redeemed from the charge of servile imitation by the fierce numbers of her satirists, the melody of her amatory bards, or the sounding rhythm of Lucretius, yet in law she had no teacher and no equal. Well may she be styled in the proud boast of Livy, "*legum potius quam hominum imperium*," a government of laws, not men. "By the gift of that spirit of legislation which was, says Chancellor D'Aguesseau, the peculiar and distinctive characteristic of the masters of the world, Rome yet reigns by her reason after having ceased to reign by her authority."

It would be a mistake to suppose that the *corpus juris civilis* is an embodiment of super-human wisdom without spot or blemish, or that its final perfection was a characteristic at every period of its existence. Its indiscriminate admirers have applied to it the complimentary phrase of "written reason," and with about as much justice as

Lord Coke's phrase of the "perfection of reason" has been ascribed to the common law. Rude and imperfect at the outset, it was only gradually spiritualized in the slow progress of centuries. And even in its most perfect form, many of its provisions were, like those of every other system, purely local, or the distorted growth of an early root deep planted in its very foundations. Some of its principles can no longer, in the advance of intelligence, be considered as sound, and its *lex regia* with its corollaries, (which, however, may be ascribed to Greek facility, and Oriental subserviency, and not to the old Italian,) must be considered as local and transitory. Its defects are numerous and weighty. And it must be read, as in fact all law ought to be read, with cautious watchfulness, ready to weigh excellencies and question doubtful propositions, not with undistinguished admiration and uncalculating acquiescence.

In addition, the civil law deserves to be studied as one of the sources, and a most prolific source of the common law itself. It crops out in every part of our system, and forms the bulk of several of the most important of its branches. The origin of the common law is, as may readily be supposed, lost in the night of time. Some of its more zealous advocates have endeavored to trace it back beyond the Roman invasion of England, but with little success. The conquest of the island was effected by Agricola under Vespasian, and the Roman sway extended into the highlands of Scotland. The country thus subdued was made a Roman Province, and placed under a Pro-consul with very extensive powers; and it can not be doubted that the Roman law was introduced, and had a deep and lasting effect. The conclusions of Straham as expressed by him in his preface to the translation of Domat, seem to be correct. "We are not, he says, to look upon the civil law altogether as a foreign commodity with respect to England, some of the particular laws thereof having been enacted for deciding controversies which arose here in England, and bearing date from this country. The greatest part of this island was governed wholly by the civil law for the space of about three hundred years, to-wit: from the reign of the Emperor Clodius to that of Honorius, during which time some of the most eminent among the Roman lawyers, as Papinian, Paulus and Ulpian, whose opinions are collected in the body of the civil law, sat in the seat of judgment here in England, and distributed justice to the inhabitants." It is not at all improbable that to this period may be traced the origin of special pleadings, borrowed from one of the modes of procedure presently to be mentioned. And

there can be no doubt that many of the rules of enlightened justice then established, lived through all subsequent revolutions, and continued to prevail even when their source had been forgotten. Afterwards, when the civil law began once more to be studied, to quote again from Strahan: "The judges and professors of the common law had frequent recourse to it in cases where the common law was silent or defective. Thus, we see in the most ancient books of the common law, as Bracton, Thornton and Fleta, that the authors thereof have transcribed, one after another, in many places, the very words of Justinian's Institutes. And sometimes the Judges on the Bench, in delivering their opinions, have quoted the rules of the civil law as the foundation of their opinions, which Mr. Selden, in his dissertation on Fleta, has clearly demonstrated from the annals of those times." Much of the law of wills, legacies, trusts, bailments, charities, executors and administrators, guardian and ward, obligation, agency, partnership, custom, prescription, and, in fine, every branch of maritime and commercial law is drawn from the same fountain. Mr. Spence, in his learned work on Equity Jurisprudence, freely confesses the obligation of that department of the law to the Roman compilations. "No nation, says Hoffman, (Leg. Studies, 504,) has been more copiously supplied from the purest streams of the civil law, and has at the same time given it so little credit for what it had received, as Great Britain. Many of their ancient writers, as Gilbert de Thornton, Bracton, the author of Fleta, and Britton, have largely transcribed from the Imperial Code, and, on some subjects, shine entirely in borrowed light. Many of their modern writers also, and several of their judges, especially Lord Mansfield, have been much indebted to this source; and their pages and judicial decisions are often illuminated by the pure and lustrous wisdom of Roman jurisprudence." In view of these facts, the student may consider himself as investigating the sources of his own law, while he is exploring the depths of the *Corpus Juris Civilis*. At every step he will find some startling resemblance, and will be tempted to consider its maxims and principles as more directly in point, and entitled to more weight than he had supposed.

There are three methods of treating the Roman law. First, the exegetic method, or the explication of the sources of the law which have reached us, according to the rules of criticism and interpretation. Second, the dogmatic method, or the systematic exposition and development of the principles now in force, drawn from the sources of the law. And third, the historic method, or a history of

the origin and progressive formation of each branch of the law. These well known methods of the civilians correspond to Bentham's tri-fold division of jurisprudence, that is, into expository, censorial and historical. They are clearly expressed in Professor Hugo's branches of inquiry, suggested in his great work on the course of study for a civilian: First, what are the existing laws; secondly, are they wise and practical; and lastly, how have they grown up and become authoritative. The natural order of inquiry would be historical, expository, censorial, (*historico—dogmatico—exegetical*); for, without tracing the law from its source, through all its changes and transformations, we can not fully know what the law is, nor, *a fortiori*, see wherein its principles need amendment. Our English libraries are greatly wanting in these systematic attempts at philosophical exposition, and scientific treatment of the body of the law. Maine's *Ancient Law*, Spence's *Equity Jurisprudence*, and Austin's *Lectures*, are recent works in the right spirit, and in the right direction.

The treasures of the civil law, are, by these and other works, rendered accessible to the purely English student. He can not commence better than by Gibbon's beautiful sketch in his matchless history, and Kent's masterly analysis in the first volume of his *Commentaries*. Cushing's *Introduction to the Study of the Roman Law*, Makel-dey's *Manual*, Taylor's *Elements of the Civil Law*, and Domat's great work are easily obtained, and will enable him to quaff more copiously. The translations of Pothier on *Sales and Obligations* will give some idea of the merits of that eminent commentator. Sandars' new edition of *Justinean's Institutes* is a great improvement on its predecessor, and is accompanied by valuable notes borrowed from Ortolan, and other French editors. Makeldey's *Manual* contains a choice list of writers on the civil law, for those who wish to dip deep, almost as formidable as a similar list of common law authors.

With these aids, what might otherwise be a difficult task, becomes a labor of love. The mountain is graded until the road is as smooth as a floor, and the ascent easy. There can be no more interesting employment than the comparison of different systems of laws, and tracing out the causes of their diversities, and noting their resemblances, and, thereby, acquiring some of the full spirit of the enlarged jurisconsult. We propose, in the residue of this article, to call attention to some of the peculiarities of the Roman system least known to the common law bar.

In the beginning of all judicial systems, form predominates over

spirit, or even substance. A rude and unlettered people require outward signs in all of their proceedings. It is only when they have made considerable progress in knowledge, that the outward coverings of visible, tangible acts is cast aside, and the spiritualized system obtains the ascendancy. The uneducated man needs something material and striking to fix his attention. An act purely mental is to him no act. Impressions made upon the senses are to him more potent than any mere intellectual impressions. Form, says Professor Ortolan, is the visible, sensible, appearance, the tangible garment given to the thought. Writing being unknown, or little practiced the acts of men, the presence of witnesses, the performance of some manual deed, must supply its place. As civilization advances, judicial institutions, as everything else human, become more spiritual. Men begin to appreciate the idea without the outward habiliments. Finally, form is entirely dispensed with, except so far as it may be absolutely essential to reveal the will and intention. These remarks are strikingly exemplified in the two systems under consideration—the common and civil law. The *alienatio per aes et librum*, the *manuum conseratio*, the *hasta*, the glebe, or portion of the soil, carried before the Pretor in controversies about land,—the touching the ear in calling upon a witness to testify, the right to seize and carry the opposite party bodily before the Magistrate, are instances of this feature of the primitive Roman law. The primitive common law was equally prolific in such outward signs, from the livery of seisin of land by actually going upon the premises and delivering a twig or a stone, to the earnest penny given to bind the bargain. Both systems underwent the same process of change. The symbolic act, so essential at first, gradually fell into disuse; and, ceasing to be understood, became ridiculous. The forms of his forefathers are the mirth and ridicule of Cicero, (Pro Murena, XII.) as are those of the common law the subject of amusement to the comic Blackstone.

The strictness in essentials which marks the course of the common law with such frequent and glaring instances of injustice, was equally conspicuous in the early Roman jurisprudence. In each system certain forms of procedure, applicable to the usual wants of litigants, were invented, and strict adherence to them imperatively required. The variation of a word, as will be seen presently, was as fatal in the one as in the other. And, as the common law jurist locked up the secrets of his profession in verbose formula and a barbarous law idiom, so the Roman jurisconsults endeavored to conceal

their forms from the people by profound secrecy and varying auspices. As centuries were required to open the road in the one case, so were they in the other.

It is remarkable, also, that the same steps were taken in both systems to simplify them, and to obviate glaring defects. Fictions were resorted to by each, to aid the transition from the primitive law, rude and inflexible in its forms, to a law more just and equitable, and to extend the consequences of the law outside of its dispositions. Fines and common recoveries, the fictitious actions of ejectment and trover, will at once occur to the student of Coke and Blackstone. The Roman system was even more prolific in this respect than its rival. The *jus postliminium*, by which a citizen, taken by the enemy, if he returns, is considered as never having left the State; and if he never returns, is considered as having died at the moment he was taken, Dig. 49, 15, 16; the supposition in one case that the right of prescription had been acquired, when, in reality, it had not, Inst., 4, 6, 4; Gai., 4, 36; and the supposition that it had not been acquired in another case, when, in truth, it had, Inst., 4, 6, 8, in order to effect the ends of justice; the assuming the quality of citizenship in a stranger, Gai., 4, 37; and of the existence of the quality of heir, contrary to the truth, Gai., 4, 34; are a few of the instances in which a sense of equity has compelled a resort to fiction in order to remedy the deficiencies, or obviate the severities of the letter of the civil law.

The introduction of different principles of decision in the administration of justice, after the forms of the law had failed to effectuate its proper ends, was another mode of escaping the stern letter of the law adopted under both systems. The honorary jurisdiction of the Pretor, and the equitable jurisdiction of the keeper of the King's conscience in England, owe their origin to the same causes; and the result in both systems may be said to be identical. The unnecessary forms of the common law, as has long since happened with most of its glaring inconsistencies and positive iniquities, are fast disappearing, outside of all statutory enactments, under the ameliorating influences of equitable principles. The rude code of the twelve tables, and the primitive superstructure erected thereon, gradually waned under the liberal edicts of the Pretor, until the last remnants were swept away by the unsparing hand of the imperial innovator.

"The law," says a distinguished commentator of the Institutes of Justinian, Ortolan, "is at first that which is ordered, a rule pre-



scribed by the legislative power. Afterwards it becomes *quod semper æquum et bonum est*, Dig., 1, 1, 11, f. Paulus; *ars boni et æqui*, Dig. Ib. Ulpian; that which is always good and right—a definition altogether spiritual.” The civil juriconsults, far more than my Lord Coke, dwell on the necessity of reason in the law. “*Quod vero contra rationem juris, constituta sunt, non est producendum ad consequentias*,” Dig., 1, 3, De. Leg., 14, f., Paulus. “*In his quæ contra rationem constituta sunt, non possumus sequi regulum juris*,” Ib., f., Julian; “*Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet*,” Ib., 39, f., Celsius. How very like my Lord Coke: “*Ratio est anima legis*,” Co. Litt., 394 b.; “*Lex plus laudatur quando ratione probatur*,” the reason of the law is the life of the law, Ib., 183 b.; “*Nihil quod est contra rationem est licitum*,” Ib., 97 b.; “*Lex humana est quoddam dictamen rationis, quo diriguntur humani actus*,” 2 Ib., 56. Peradventure, Lord Coke may have sipped some little from the stream of the civil law through the work of Bracton. “*Lex est sanctio justæ*,” says that writer, “*jubens honesta, et prohibens contraria*.”

The student of the common law will find in the civil law, almost at every step, something to remind him of his own system, and will discover that the resemblances are not merely vague and general. He will notice many particulars, not confessedly drawn from this source, so strikingly similar as to leave him in doubt whether they might not have been transferred directly from the Digest to some of the early compilations of English law. The pleadings of the common law and of one of the systems of Roman law, as will presently be shown, are singularly alike, though with marked advantage on the part of the latter in brevity and perspicuity, and were doubtless designed to accomplish the same end, the reducing the controversy to a point for trial by the country. The functions of the *judices* and *centumviri*, were similar, in most respects, to these of a modern jury. So, the interdict *de libero homine exhibendo*, was precisely our writ of *habeas corpus*. It was an order addressed to any one who detained a free man, and required his instant production: “*Quem liberum dolo malo retines, exhibens*.” It was granted instantly upon the demand of any one. We may also notice the equally remarkable coincidence in the well settled principle of both laws, that a man’s house is his castle, and may not be broken into for the purpose of serving civil process. “*Plerique putaverunt*,” says the Pandects, “*nullum de domo sua in jus vocari licere, quia domus tutissimum cuique refugium atque receptaculum sit, eumque, qui inde in jus vocaret, vim inferre videri*,”



Dig., 2, 4, 18. It was admitted from an early period, that the house of a citizen was for him an inviolable asylum, from which he could neither be summoned nor dragged to the tribunal in a civil suit.

In the common law, during the historic period, the practice of the courts has been substantially the same. The actor or plaintiff, was entitled to his original writ according to the form of action best suited to his case, and to enforce the appearance of the defendant by compulsory process, after which the litigants, at first by oral allegations in open court, subsequently by statements in writing, mutually made with a view to ascertain the real point of controversy, reduced the litigation to a single issue, so that the parties might know the evidence necessary to be introduced, and the jury might be able to decide the case. This system of special pleading, for such it was at all times, was remarkably similar in many respects to one of the methods of procedure at Rome, as we have already intimated, and may, in reality, have been borrowed from it, either directly through the Roman jurists sent to preside over the English courts, or indirectly through the Franks and the Lombards. Still, it may have been indigenous in the British Isle, in the same way as it grew up in Rome itself, and is usually supposed to have originated among the Gothic races. There is a great deal in the suggestion of Montesquieu, that the people are not jurisconsults; and whenever they are called upon to decide controversies, it is necessary in the very nature of things, to ascertain and fix the issue, in order that they may have it always clearly before them. This necessity would lead to the same result wherever jury trial, or trial by the body of the country, prevails, the adoption of some method and forms by which the inquiry is narrowed to a point. Accordingly, we find that in Greece, in their proceedings before the Areopagus, in Rome, before the *judices* and *centumviri*, and among the Gothic and Teutonic races before the people, a mode of judicial procedure was adopted in each, having the same object in view, and therefore, in many respects, strikingly alike. The natural progress of the mind in effecting this result, is beautifully exhibited in the oratorical analysis of Quintilian, quoted by Sergeant Stephens in Note 28 to his "Treatise on the Principles of Pleading," and which, as he truly observes, "exhibits exactly the principle of English pleading." The principle, let it be noted, not the practice, which in the course of time marred the original symmetry by jarring anomalies and preposterous forms. The vast and complicated science of special pleading—to the Jews a stumbling block and to the Greeks foolishness—is, in its essence and purity, nothing more than the ap-

plication of logic and pure dialectics to the elimination of judicial controversies, with a view to simplify the issues for the comprehension of the common mind. The intellect that can grasp the elements of logic, can find no difficulty in mastering the principles of pleading. In point of logical simplicity, the Roman forms are equal to those of English, while in terseness and perspicuous brevity, they are incomparably superior.

There were among the Romans three distinct methods of procedure in the conduct of suits in court, which prevailed at different times. These periods are not, of course, accurately marked—the one terminating abruptly, and the other commencing *eo instanti*. On the contrary, the systems ran into each other, rendering it difficult to designate with certainty the exact steps which produced the change. Nevertheless, it is easy to distinguish these different methods, and to mark, with sufficient precision, the periods at which the one may be considered to have ceased to predominate, and the other to have become the leading system.

The three systems of judicial procedure thus alluded to are: First, the system of actions of the law, "*legis actiones*;" second, the system of forms, "*per formulam*," also called the ordinary procedure, "*judicia ordinaria*;" and third, the system of extraordinary procedure, "*judicia extraordinaria*." The first system prevailed down to the enactment of the law *Æbutia*, A. U. C., 583 or 597. This period and this system are characteristic of the primitive Romans. They are marked by the original simplicity of a rude tribe, bear the patrician and sacerdotal impress, and are full of the symbols and material forms of incipient civilization. The second period continued to the reign of Diocletian, year of Rome 1047, A. D., 294. In this period, the labors of the Pretor and the philosophic jurisconsult influenced and remodeled the rude materials of the primitive age. The enlarged spirit of the Roman plebs—a vigorous and robust yeomanry worthy of the seven-hilled city—has expanded the narrow and confined system of the patrician and the priest, and enabled it to embrace even the stranger of other lands. The third system, from being the exception under the second system, became the general rule, first in the provinces under Diocletian, and afterwards throughout the Roman empire. This is the system, in substance, which continues in force in nearly all modern Europe, which has prevailed in Louisiana since its first settlement, and has recently been adopted by so many of the Northern States of the Union. The pleadings in chancery are only an amplification of those proper to this system.

Under the early Roman system, the right to declare the law, "*jus*," and the right to decide the matters in controversy, "*judicium*," were considered as distinct, kept separate for the most part, and confided to different hands. To the magistrate, "*magistratus*," was given the power to declare the law; to the judge, "*judex*," was left the investigation of the facts, and the termination of the litigation by a decision, verdict, or judgment. By a figure of speech, to be *in jure*, was to be before the magistrate charged with declaring the law; to be *in judicio*, was to be before the judge authorized to decide the controversy. This separation between the *jus* and the *judicium*, the magistrate and the judge, corresponds, in some degree, to the distinction, under our system, between questions of law and questions of fact, and the provinces of court and jury. The line was not always so distinctly drawn, but it was recognized as existing. The right of the *judex* to decide the law, depended on the nature of the case, and the powers conferred upon him by the magistrate. As a general rule, he only found the fact, and the law, through the magistrate, pronounced the judgment. The distinctions here noted existed under the first system, but was not generally adopted in practice. Under the second system, the separation became complete, and it was only occasionally and by way of exception, "*per extraordinaria*," the magistrate himself performed the duties of the judge. Under the third system, the extraordinary became the common—the two functions were united, and it was only by exception that they were ever separated.

The law "*jus*," and the right to declare the law, "*jurisdictio*," were confided to a magistrate invested with the sovereignty of the State, and having authority in all cases. The *judex* was selected from a designated class, for the particular occasion. The parties were allowed to choose their own judge. If one were proposed to them by the magistrate, they might accept him, or refuse without assigning any cause. If the parties could not agree upon the *judex*, he was selected by lot. And whether agreed upon by the parties, chosen by the magistrate, or appointed by lot, he was clothed with the necessary authority by the rescript of the magistrate. It was a public charge which no citizen was at liberty to refuse. A single magistrate, and a single judge, as a general rule, sufficed in early times, it seems, for a single case, with liberty, however, to call in the aid of assessors and jurisconsults, whose counsel they might receive as a means of enlightening their own judgment. The exact number of the *judices* in each case, was probably left to the option of the parties, and perhaps, also varied with the nature of the controversy.

Already created, but vague and indeterminate in its details, under the first system of procedure, organized and developed in an admirable manner under the second, this beautiful theory entirely disappeared under the third.

Under the first system, the magistrates at Rome were primarily the Kings, then the Consuls, then the Pretors, and, for certain matters, the Ediles; in the municipes, or privileged cities, the *duumvirs*—consuls on a small scale; in the provinces, which began to be added towards the close of this period, the *pro-pretors*, and *pro-consuls*. The judges were: the *judex*, selected for each case, who could only be taken from the rank of Senators; the *recuperatores*, who were always many (from three to five at least) for each case, and who might be selected from other than senatorial ranks; and finally, the *centumviri*, chosen annually by the *comitia* from the tribes. In certain cases, the magistrate performed the functions of the judge; in other cases, he sent the parties before a judge proper; but in what cases the trial took place before the *judex*, when before the *recuperatores*, and when before the college of *centumvirs*, is not fully understood.

The first step under this system was to call upon and enforce the appearance of the defendant. This act was performed in the rudest simplicity. The plaintiff himself was required to summon his adversary before the magistrate, technically styled *in jus vocare*, and, if necessary, to bring him by force. The summons was made in prescribed words. "*In jus vocat*" are the words of the Twelve Tables. Equivalent words, such as "*in jus eamus*," "*in jus te voco*," and the like, are common in the works of the comic dramatists, Terence and Plautus. If the party summoned refused to go, his adversary had recourse to the attestation of witnesses, that is to say, he pronounced in a loud voice certain formulistic words, as we find from the satires of Horace, and the comedies of Plautus, "*licet te antestare*," signifying in effect, "I call you to witness," at the same time touching the lower part of the ear of the witness. Having done this, the plaintiff was at liberty to lay hands upon his adversary, called *manus injectio*, and drag him before the magistrate by main force, styled *in jus raptare*, and by the neck, "*obtorto collo*." The defendant might excuse himself from personal attendance by procuring a *vindex* to stand surety for him, and manage his cause.

The actions of the law, from which this system took its name, were five in number. Three were forms of procedure for the purpose of obtaining a decision of the matters in dispute; and two were used for the purpose of carrying the decision into execution. The first of

these was the *actio sacramenti*, the most ancient of all, which applied, with some variation of form, to the pursuit both of obligations and rights of property, but the characteristic of which in all cases, consisted in the *sacramentum*—a sum of money which each litigant was compelled to place in the hands of the pontifex, or priest, to go on the part of the loser to the profit of religion, *ad sacra publica*. The second was the *judicis postulatio*, so called from the demand made of the magistrate for a *judex* to try the case, and which form of action appears to have been also a general remedy for the enforcement of rights. The third action was the *condictio*, the most recent of the actions of the law, and exclusively used for the pursuit of obligations. The two remaining actions of the law used to carry the judgment into effect, were the *manus injectio*, the corporal seizure of the person of the condemned debtor, by means of which he might be adjudged in proprietorship to the creditor; and the *pignoris capio*, or seizure of the property of the debtor. Action, in the phrase *legis actiones*, is a general term embracing the whole procedure in the particular case. The five “actions” above enumerated were called actions of the law, says Gains, either because they were creations of the law as contradistinguished from creations of the Pretor, or because they were conceived according to the strict letter of the law, *legum verbis accommodatae*, and with rigid adherence to established terms.

Arrived before the magistrate, after a preliminary exposition of the matters in dispute, and the respective, oral allegations of the parties intended to determine the point in controversy, the litigants proceeded according to the consecrated ritual; in other words, technical forms, to the accomplishment of the action of the law used. If the matter is such that it can be decided by the magistrate, the suit terminates before him. This is always the case with the action *per manus injectio*. If the litigation is not of this character, the parties must be sent before a judge, an arbiter, or the centumvirs, as the case may be. This was called the *addictio* or *datio judicis*. The judge being given, the parties mutually summon each other to appear before him upon the third day, called *comperendinus*, or *perendinus dies*, and the mutual summons *comperendinatio*. The attendance of the parties was also secured by mutual pledges or sureties—*vas-vudes*. Under this system, three kinds of bail were in use: 1st. The *vindex*, who takes upon himself the management of a cause. 2d. The *præes*, plural *prædes*, who became surety to the magistrate for the *Sacramentum*, and to the party for the restitution of the subject matter of dispute and its fruits. 3d. The *vas*, *vades*, who secured the attendance of the parties both *in jure* and *in judice*.

Before the *judex*, or at the trial, the litigants commenced by explaining their controversy; then followed the proof by witnesses, inspection of the subject, and pleadings at large by the parties or their counsel, after which the decision was given. The judgment was usually enforced through the instrumentality of the magistrate. Where real rights were involved—that is, rights of things in the civil law sense, including both real and personal property, the execution was usually by putting the successful party in possession. In the case of obligations, except in the rare action of *pignoris capio*, performance was secured by seizure of the person of the defendant by means of the action *per manus injectionem*.

Actions of the law, always excepting the *pignoris capio*, could only take place on certain days in the year. Then only was it permitted to the magistrate to exercise his jurisdiction—to speak the law—and these days were hence called *dies fasti*. Other days were *nefastes*, when, to use the language of Ovid,

“His *nefastus erit*, per quem tua verba silentur.

*Fastus erit*, per quem lege licebit age.”

—Fast., 1, 47.

the three consecrated words of the law *do, dico, addico*, were silent. The fixing of the *dies fasti* was at first a religious act, and determined in secrecy; and even after the mystery had to a great extent, been removed, these days from their very nature continued to be variable. The actions of the law had ceased to exist for more than a century, when, for the convenience of the country people, the days of marketing, the *nundines* or every ninth day, were legislatively made *dies fasti* by the law *Hortensia de nundinis*, A. U. C., 685.

Justice was among the Romans always administered publicly. Under the first system this principal was most rigidly enforced. It was in the forum, in the open day, that all judicial action was had, and the setting sun terminated the proceedings. This is often alluded to in the comic dramatists.

“*Omnia iterum vis memorari, scelus, ut defiat dies.*”

“You want me to begin again, you rascal, since the day fails!” is the angry exclamation of Trachaliön in Plautus, worn out by the interruptions of his adversary: *Rudens*, a. 4, sc. 4.

This was the period of symbols. Here figured the lance, the clod of turf, the tile and other material representations of ideas and objects. This was the age of words clothed by law with a sacred character—technical terms embracing a large number of particulars, the use of which was essential to the validity of judicial acts. The use of the word vines, “*vites*,” instead of the word trees, “*arbores*,” al-



though the suit might relate exclusively to vines, was a fatal defect the term *arbores* being technical and comprehending all the growths of the earth: Gai., 4, 10, 30. Here again the student is reminded of one of the marked features of his own system when it was, *apud* Coke, the "perfection of reason." This system bears the frequent impress of the sacerdotal finger. We see this in the *sacramentum*—the deposit of a certain sum of money in the hands of the pontiff as the first step in the action; and in the *pignoris capio*, accorded at first for the price of the victim sold for the altar, or for money due for a beast of burden, when the money was intended to be spent by the creditor in sacrifices. In this period also, the patrician rule is in all its vigor. The magistrate is patrician; the *judex* can only be taken from the patrician order. The institution of the *centumviri* and of the *recuperatores* seems to have been the commencement of a change in this respect, destined to produce most important results.

The gradual expansion of the rude elements of the primeval system is exemplified in the *actio sacramenti*. The forms of this action applicable to the recovery of property were fictitiously employed to arrive at results not authorized by the primitive law, or subject to more difficult conditions. This ingenious fiction consisted, when one person wished to transfer to another a real right, in the latter feigning before the magistrate a reclamation of his right. He brought suit, to use modern phraseology, for that which did not belong to him as if it were his property. The defendant, who wished to transfer the property, did not deny the claim; whereupon, there being no contest as to the facts, the magistrate declared the law, and adjudged the property to him who had reclaimed it. From this fictitious employment of the *actio sacramenti*, are deduced the transfer of the title or ownership of things corporeal and incorporeal, the change of tutelage, the manumission of slaves, the emancipation of children, and the adoption of sons of families.

In like manner all the actions of the law gradually underwent a change. Their original character—sacerdotal, patrician, symbolic, and dangerously technical,—became more and more inconsistent with the manners and social requirements of a progressive race. Above all, they were to the Plebs—that robust yeomanry worthy of comparison with the yeomanry of old England—the remains of servitude against which they had so unremittingly battled. We learn from Gaius that they had become unpopular in the Sixth century from the building of the city according to the received computation. Abandoned afterwards in actual practice by a resort



to the judicial forms created for the use of foreigners, they were legislatively suppressed by the law *Æbutia* and the two Julian laws. Their sole employment at last consisted in their fictitious use in judicial sales and other similar cases.

Under the second system—the system of forms or ordinary procedure, the distinction between the magistrate and the *judex*, became clearly marked. The character of the *in jus vocatio* in theory remains the same, and the task of summoning, and if necessary dragging by force his adversary before the magistrate, is still left to the plaintiff as a private act. But, in practice, custom and the Prætorian law had worked a change, and substituted public coercion in lieu of private battle. An action for a pecuniary penalty has been allowed against him who refuses to appear, and all persons who may have aided or abetted him in his resistance. The interposition of the *vindex* no longer exists, but the litigant may give security for his appearance and abiding by the judgment, “*fide jussor judicio sistendi causa*.” If the defendant remained absent, and no person would appear for him, the edict of the Pretor furnished a remedy somewhat like the English plan of outlawry, and still more like the modern plan of a receiver, by putting the plaintiff in possession of the goods of the absent party, “*missio in possessionem custodia causa*.” The magistrates during this period, were: at Rome the Pretors gradually added and increased to the number of eighteen in the time of Pomponius, the Ediles, the Prefect of the city, and the Pretorian Prefect; in the provinces, the governors under the various titles of proconsuls, proprætors, lieutenants of Cæsar, presidents or prefects. The provincial magistrates held at stated times, assizes, “*conventus*,” in the principal towns of their provinces. The judges consisted of the *judex* given for each cause, the *recuperatores* and the college of centumvirs, who retained their functions, although in a declining condition, to the end of the second period. The most remarkable change in the *judicium* grew out of the extension of the right of acting in that capacity to all citizens. After having been bitterly contested for half a century, from the time of the Gracchi to the age of Pompey, between the equites and senators, the *judicium* passed these orders and extended to the people. Five *decuriæ* or lists of citizens called to be judges, were made out each year by the Pretors in the forum in the midst of the people and publicly exposed. The first *decuria* was composed of senators, the second of equites, the third of soldiers, the fourth and fifth—the one added by Augustus, the other by Caligula—of citizens paying an inferior tax. These

were the *judices* for the year from whom the litigants might make their selections. "*La caste superieur*," says Ortolan, quite happily, "*est dechue de son monopole; la Plebe est affranchie de la justice patricienne; le citoyen, comme nous dirons en langue moderne, est juge par ses pairs.*" The superior orders have lost their monopoly; the Plebs are freed from aristocratic rule; the citizen, as we say in modern language, is tried by his peers.

During this period, the consecrated words and acts, the symbols and material objects of the first system have disappeared. They are replaced by the science of the law. The custom of calling in the aid of jurisconsults to assist in settling questions of difficulty, and to enlighten the mind of the judge by legal casuistry and the lights of philosophy, has become common. This admirable custom seems to have prevailed from the earliest times. It tended, more largely than any other single cause, to that steady and continuous improvement of law as a science which is apparent in Roman jurisprudence.

The parties being brought before the magistrate, the rites and ceremonies of the actions of the law are replaced by the forms of the new system. The proceedings before the magistrate have for their object the determining whether the plaintiff is entitled to an action, and, if so, the designation, redaction, and delivery of a formula. If the litigation is of a nature to be resolved *extra ordinem*, or if the magistrate decides that the plaintiff is not entitled to any action, or if the defendant admit the plaintiff's claim; or finally, if one of the parties offers to the other the oath upon the existence of the disputed right, by which offer he agrees to trust the case to the oath of his antagonist,—in these cases the suit is terminated before the magistrate. In all other cases, the appointment of a judge and the redaction of a formula take place. The magistrate charged with organizing the *judicium*, hears the statement of the parties, but instead of sending them before the *judex* with verbal directions, as under the previous system, he performs his duty by delivering to the parties a formula, which is to govern the future progress of the cause. The formula is made up, as a direction to the judges, from the reciprocal allegations, charges and countercharges of the litigants. The plaintiff makes his charge, called *intentio*, the defendant answers, *exceptio*, the plaintiff, if need be, replies, *replicatio*, to which there may be a *triplicatio*, &c., in a manner strictly analogous to the common law mode of special pleading, and in fact almost identical with the oral pleadings as we find them in the year books. The formula was nothing more than the reduction of these statements to writing, until an issue, *ex-*

*itum*, was reached. It consisted ordinarily of a recital of the subject matter of controversy, by way of inducement; then of the mutual charges and replies of the parties, until the fact about which they can not agree is ascertained; and lastly, the judgment to be rendered according to the findings of fact upon the trial. The redaction of these formula is the most important part of the procedure under this system, and the whole care of the law is directed to it. The most eminent jurisconsults are consulted by the suitors and the magistrates. Each right has its appropriate formula, and the usual formula are drawn up in advance and hung up in the forum. The plaintiff, assisted by his counsel, points out before the magistrate the form he requires; its elements are canvassed; the formula accommodated to the particular case; and finally delivered to the litigants.

The demand of the formula was styled "*postulatio formulæ, vel actionis, vel judicii.*"

The principal parts of the formula were:

1st. The caption, "*judex esto,*" let there be a Judge.

2nd. *Demonstratio.* The statement of the facts which the plaintiff alleges as the grounds of his case, and which, like similar recitals in modern pleading, might be omitted.

3rd. *Intentio.* The specification of the plaintiff's claim, in the nature of the modern declaration.

4th. *Exceptio.* The plea or answer of the defendant. And to this there might be a *replicatio*, of the plaintiff, a *triplicatio* of the defendant, and so on as before explained to an issue.

5th. *Condemnatio.* The order to the Judge to condemn or discharge the defendant according to the weight of the evidence, or the law of the case.

As a specimen of the condensed brevity, and masterly perspicuity of these forms, take the following example:

"*Judex esto. Quod Aulus Agerius Numerio Negidio hominem revendit; si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere; si in ea re nihil dolo malo Auli Agerio factum sit neque fiat; judex Numerium Negidium Aulo Agerio sestertiam X millia condemnato, si non paret, absolvito.*"

This brief form in a few pregnant lines, contains the substance of whole pages of Chitty, and embraces declaration, plea, replication, and the final judgment to be given upon the facts as they may be found. The admirers of the forms of special pleading at common law in their largest development may here learn a useful lesson.

"Let there be a judge, *i. e.*, let the parties have a trial. *Aulus Agerius*, the plaintiff, says that he has sold a slave to *Numerius Negilius*, the defendant. If it is found that *Numerius Negilius* owes *Aulus Agerius* ten thousand *sestertia* as the price of said slave, unless it further appears that *Aulus Agerius* has been guilty of fraud in the transaction, let judgment be given against the defendant for the sum claimed. Otherwise, discharge him."

The formula, then, is nothing more than the allegations of the parties reduced to writing, and so arranged as to settle the issue to be tried, and the judgment to be rendered. It, instead of sending the parties with the formula to a Judge, the Magistrate had empannelled the *centumviri* or *recuperatores* as a jury, and submitted the issue to them upon the evidence, and, upon their finding pronounced judgment, the proceedings would have been substantially a trial at common law.

The mission of the *judex* terminated with the judgment. The execution of the judgment belonged to the Magistrate.

The judgment might, however, be annulled, rescinded, or reversed in one of three ways :

1. The judgment might be null because contrary to an express law, *Senatus consult*, or Constitution; by reason of some material defect in the proceedings; on account of the incompetency of the Magistrate or Judges, or incapacity of one of the parties. In these cases, the party might avail himself of the nullity before the Magistrate, the plaintiff, by commencing a new action; the defendant, by resisting the execution of the void judgment.

2. Even when the sentence is not a nullity, it might, for particular causes, such as fraud in its procurement or incapacity of a party, be treated by the Magistrate as never having been made, and the defendant restored to his rights.

3. It seems, too, that every Magistrate, or, at any rate the Tribunes, had the power of annulling the decision of an inferior, and, perhaps, equal Magistrate, by his simple veto.

4. And finally from the time of Augustus, and probably by the law *Julia judiciaria*, the right of appeal was introduced, and gradually developed. The appeal might be made immediately after the sentence *viva voce*, "*inter acta voce appellare*," or within a certain time by written notice, "*libelli appellatorii*." No appeal could be tried without a rescript, called "*litteræ dimissoriæ*," from the inferior to the superior jurisdiction, giving full particulars of the case. The appeal

suspended the execution, and carried the cause to the superior Magistrate; and so, in some instances, more than once, from degree to degree, and finally to the Emperor, in the last resort.

Criminal prosecutions, under the Roman law, were not conducted by the State, but by any private citizen who chose to act. The life of every citizen was from an early period protected by an appeal to the *comitia*, and his person was subsequently made inviolable by the Porcian and Sempronian law. The personal presence of the accused and the accuser was necessary, and the witnesses, as a general rule, were required to be examined in open court. Penal jurisprudence was at no time, a very important part of the Roman law, owing, no doubt, to the extensive power of the father of the family, and of the general in command of an army. Roman citizens had the right, under the Republic, of stopping the proceedings by an appeal to the Tribunes. And, under the empire, Roman citizens in the Provinces might appeal to the Emperors. We have a notable instance of the exercise of this right in the case of the Apostle Paul, and his memorable "appeal unto Cæsar."

Under the Republic, a Roman citizen could theoretically only be tried on a criminal charge by the people, but this power was delegated by special laws to certain bodies of judges superintended by the Pretors. Thus, one Pretor presided over trials for homicide, another over trials for treason, and so on. But the presiding magistrate only saw to the legal formality of the proceedings, and did not give the sentence. This was pronounced by the judges, or rather jurors, chosen by lot from amongst the Senators or Knights, who gave their vote by ballot. Under the Empire, this system, although not formally abolished, was gradually superseded. The Emperors from the first, claimed supreme judicial authority, both civil and criminal, to be exercised in person or by delegates. The power to try criminals was delegated chiefly to the Prefect of the city; and though such cases might, up to the beginning of the second century, be tried by the Pretors in the old way, yet this became more and more unusual, and finally died out. Thus the trial of criminal charges was transferred from a jury of independent citizens, to a single magistrate appointed by the Emperor, controlled only by a council of assessors, to whose opinions he was not bound to conform: See Conybeare & Howson's *Life of St. Paul*, vol. 2, p. 470; and Gibbon.

When the magistrate, as we have seen, instead of sending the parties before a *judex*, was authorized to decide the case himself, the form of procedure was called "*extra ordinem cognitio, judicia extraor-*

*dinaria.*" This was always the case in some particular class of actions, and gradually extended to others. In the reign of Diocletian, the formulary system began to disappear under the more frequent use of the extraordinary procedure. A constitution of that Emperor, A. D., 294, established the extraordinary as the general practice in the provinces. Afterwards, this practice was extended over the whole Empire, and the system of formulas gave place entirely to its successor.

*"Le gouvernement est imperialisé,"* says Prof. Ortolan, eloquently, *"ce qui fut la constitution de Rome n'existe plus. L'aristocratie des familles patriciennes et la susceptibilité remuante de la Plebe dorment dans l'histoire. La population primitive a même disparu sous une illusion incessante de toutes les populations. Depuis Constantin, Rome et le Tibre sont d'échus; Constantinople et le Bosphore les remplacent; l'empire n'est plus Romain, il est Asiatique. Il se divise en quatre grandes Prefectures: l'orient, l'Illurie, l'Italie, les Gaules; chaque Diocèse en Provinces; l'Italie est une Prefecture! Le Christianisme est la religion de l'état."*—Generalization, § 102.

The government is imperialized. The pride of the patrician, the restless ambition of the Plebs sleep in history. Italy is a prefecture! The motley population of a conquered world has taken the place of the stern old Roman. The gorgeous worship of the Etruscan priesthood has been replaced by the religion of the crucified Nazarene. The Empire is no longer Latin, it is Asiatic!

The profound revolution here referred to is equally evidenced in the judiciary system. There is no longer any question about patrician magistrates charged with declaring the law; there are no longer any contests between the Senators, and the Equites, and the Plebs, for admission to the list of *judices*. There are no longer any *decuria* prepared in the forum annually before the people, and publicly exposed. The City no longer chooses its magistrates, the citizen his judge. These also sleep in history!

The Rector or President of each province; the Vicarius, Vicegerent, or other lieutenant delegated by the Prefect; the Pretorian Prefect judging upon appeal as representative of the Emperor, and, as final resort, the Emperor himself; the local magistrates of each city with inferior and limited jurisdiction; Rome, Constantinople, and Alexandria, with their separate systems; the fiscal jurisdiction confided by the Emperor to special agents; the military jurisdiction entirely distinct from the civil; and finally the ecclesiastical jurisdiction, obligatory upon the clergy, voluntary upon the laity;—such is

the judiciary organization during the third period. The distinction between the *jus* and the *judicium* has disappeared; there is no longer any institution of a judge, or redaction of a formula for each case. The person seeking redress summons his adversary before the court by regular process, served by a ministerial officer, and the magistrate decides the case. That which was the exception becomes the rule. Every procedure is extraordinary.

Scarce a vestige of ancient Rome remained to her degenerate descendants. Even the memory of her early annals was being lost, and the vigorous tongue of Cato and Tully fast waning before the language of the flexible Greek. The Roman law alone remained. Here was gathered the embodied wisdom of thirteen hundred years, and the abstract intellect of an unrivalled list of eminent jurisconsults. And, although the practical administration of justice had lost much of the merit which characterized it in the early days of the Republic; although the stern purity of the magistrate, the unswerving integrity of the *judices*, and the bold freedom of the primitive advocate, had given place to the venality of the imperial vicegerent and the cringing servility of Eunuchs and courtiers; yet it is certain the law itself could at no previous period, have preferred stronger claims to be considered as "written reason." The original simplicity had disappeared before the labors of the philosophic jurists,—the code of the Decemvirs had expanded into the Pandects,—the rude covering of form had been thrown off, and the Roman law had assumed the flexible garb of principle, applicable to every age and every country.

W. F. COOPER.



### Acceptance of Bills of Exchange.

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§ 1. The drawer of a bill undertakes that when it is presented to the drawee he will accept it; and by acceptance is meant an undertaking on his part to pay it according to its tenor. The acceptor by his act, engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity; and if he does not, the holder may sue him.<sup>1</sup>

If the drawee have funds in his hands belonging to the drawer, it is his duty, according to mercantile usage, to know the bill by accepting it; but he is not legally bound to do so by the mere fact that he holds such funds, any more than a debtor is legally bound to execute a promissory note to his creditor for the amount due upon his request to do so.<sup>2</sup> But there may be relations between the drawer and drawee which make it incumbent on the latter to honor the bill. Thus, if the drawee has been supplied with funds for the express purpose of meeting the bill; or if he have money on deposit under such circumstances as imply a contract on his part to accept the bill, as for instance, if he be a banker and the bill (or check) be drawn on a cash account, he will be answerable in an action of tort for not honoring the draft.<sup>3</sup>

The effect of the acceptance of a bill is to constitute the acceptor the principal debtor. The bill becomes by the acceptance very similar to a promissory note—the acceptor being the promiser, and the drawer standing in the relation of an indorser.

But in respect to the acceptor's position with regard to the drawer, and the amount for which he renders himself liable by accepting the bill, it is well to observe that the acceptance does not entitle the acceptor to charge it in account against the drawer from the date of acceptance, unless he pays the whole amount at the time, or discharges the drawer from all responsibility.<sup>4</sup>

§ 2. According to the law merchant, an acceptance may be *expressed* in words, or *implied* from the conduct of the drawee. It may

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<sup>1</sup>Hoffman & Co. vs. Milwaukee Bank, 12 Wallace, 181; Bayley on Bills, 96.

<sup>2</sup>Story on Bills, 113, 117, 238; Edwards on Bills, 405.

<sup>3</sup>Marzetti vs. Williams, 1 Barn. & Ad., 415. (20 E. C. L. R.) See chapter on Checks.

<sup>4</sup>Bracton vs. Willing, 4 Call., 288.

be *verbal* or *written*. It may be in writing on the bill itself, or on a separate paper. It may be *absolute*, or *conditional*, or *qualified*. It may be *before* the bill is drawn or *afterwards*.

By statute, in many of the States, these principles of the law merchant governing acceptances are modified, or repealed in one respect or another, as will be seen hereafter.

It is extraordinary that such a case arises, but a draft drawn by A. upon B., requiring him to pay to the order of B. at a certain time, a certain sum "without acceptance," is nevertheless a bill of exchange, and acceptance would be unnecessary.<sup>1</sup>

### WHO MAY ACCEPT.

§ 3. The drawing of a bill imports a contract on the part of the drawer that the drawee is a person competent to accept; and therefore, if the holder upon presentment of the bill, ascertains that the drawee is incapable of contracting—for instance, is a minor, an idiot, or a married woman—he may cause it to be protested, and proceed against antecedent parties as usual in cases of dishonor.<sup>2</sup>

§ 4. Except in cases of acceptance for honor, no one can accept a bill, except the party on whom it is drawn, or his authorized agent.<sup>3</sup> Thus, if it be addressed to A., an acceptance by B., unless for honor, will not bind him.<sup>4</sup> Nor can there be a series of acceptors; and if<sup>5</sup> a bill addressed to one be accepted by two persons, the acceptance of the first will be vitiated by having been altered in an essential part.<sup>6</sup> But if any other person, after an acceptance, subsequently accepts the bill *for the purpose of guaranteeing its credit* in the usual form of an acceptance, then if there is a sufficient consideration, he may be bound thereby as a guarantor; but he is not liable as an acceptor.<sup>7</sup>

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<sup>1</sup>Miller vs. Thomson, 3 Man. & G., 576; (42 E. C. L. R.;) Rey vs. Kinnear, 2 M. & Rob., 117.

<sup>2</sup>Chitty on Bills, (13 Am. ed.,) 320; Thomson on Bills, (Wilson's ed.,) 210; Story on Bills, § 230.

<sup>3</sup>Davis vs. Clark, 6 Q. B., 16, (51 E. C. L. R.;) Jenkins vs. Hutchinson, 13 Q. B., 744; (66 E. C. L. R.;) Palhill vs. Walter, 3 B. & Ad., 114; (23 E. C. L. R.)

<sup>4</sup>Davis vs. Clarke, 6 Q. B., 16, (51 E. C. L. R.;) May vs. Kelly, 27 Ala., 497.

<sup>5</sup>Tackson vs. Hudson, 2 Camp., 447; Bayley on Bills, 100; Story on Bills, § 254.

<sup>6</sup>Thomson on Bills, 112, 212. There being no agreement as to any guaranty.

<sup>7</sup>Story on Bills, § 254; Chitty on Bills, (13 Am. ed.,) 321; Tackson vs. Hudson, 2 Camp., 447. In this case the bill was drawn on and accepted by I. Irving. Under his acceptance a defendant wrote "Accepted, Jos. Hudson, payable at, &c." Hudson was sued as acceptor; and plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless defendant would become his surety, and the defendant in order to guarantee Irving's credit wrote the acceptance in the bill. Lord Ellenborough said this was no acceptance, but a collateral undertaking.

## BILLS DRAWN ON MORE THAN ONE PERSON.

§ 5. If a bill is drawn on two persons not partners, both should accept, and if either refuse, the bill may be protested for his non-acceptance;<sup>1</sup> but the party accepting will be bound by his acceptance.<sup>2</sup> If the bill is addressed to two persons, "or either of them," acceptance by either is a sufficient compliance with its mandate.<sup>3</sup>

§ 6. If a bill be drawn upon a firm, it may be accepted by any one of the partners in the partnership name;<sup>4</sup> and it will be a good partnership acceptance, if in one partner's individual name;<sup>5</sup> but it seems that in either case, in order to bind the firm, it must have been drawn for partnership purposes,<sup>6</sup> unless in the hands of a *bona fide* holder for value, without notice, in which event it would be valid whether drawn for partnership purposes or otherwise.<sup>7</sup>

If a bill drawn on an individual member of a firm be accepted by him in the name of the firm, it will bind him individually, but not the firm;<sup>8</sup> and if a bill be drawn on a firm and accepted by a person describing himself as manager or agent, there may be an action against him as acceptor, although he may have falsely affirmed his authority to accept, and the firm be not bound.<sup>9</sup> An acceptance of a bill drawn on him by a member of a firm will bind him only, although expressed to be on account of the firm.<sup>10</sup>

§ 7. An acceptance may be made by an agent; but certainly the holder may require the production by him of clear and explicit authority from his principal to accept in his name, and without its production treat the bill as dishonored;<sup>11</sup> and it has been doubted wheth-

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which should have been declared on as such. See Bayley on Bills, 100. In Thomson on Bills, p. 212, it is said: "It seems that a second person may accept a bill addressed to a first, if he accept on the footing expressed or understood at the time the bill was issued that he was to be a cautioner for the first; and if a person in this way become validly a party to a bill, he stands toward the holder in the same relation as if he were a co-principal, his rights as cautioner merely regulating his right of relief against the true principal."

<sup>1</sup>Chitty on Bills, (13 Am. ed.,) 73, 321; Dupays *vs.* Shepherd, Holt, 297.

<sup>2</sup>Owen *vs.* Van Uster, 10 C. B., 318, (70 E. C. L. R.;) Bayley on Bills, 40, 101.

<sup>3</sup>Thomson on Bills, 212.

<sup>4</sup>Pinkney *vs.* Hull, 1 Salk., 126; Mason *vs.* Rumsey, 1 Camp., 384.

<sup>5</sup>Byles on Bills, (Sharswood's ed.,) 126; Mason *vs.* Rumsey, 1 Camp., 384; Chitty (13 Am. ed.,) 53-54. <sup>6</sup>Pinkney *vs.* Hall, 1 Salk., 126.

<sup>7</sup>Catskill Bank *vs.* Stall, 15 Wend., 364; Bairs *vs.* Cochran, 4 Sergt. & R., 397; Livingston *vs.* Roosevelt, 4 Johns., 351.

<sup>8</sup>Nichols *vs.* Diamond, 24 Eng. Law & Eq. R., 403.

<sup>9</sup>Owen *vs.* Van Uster, 270 E. C. L. R., 318. <sup>10</sup>Cunningham *vs.* Smithson, 12 Leigh, 32

<sup>11</sup>Atwood *vs.* Munnings, 7 B. & C., 278, (14 E. C. L. R.;) Byles on Bills, (Sharswood's ed.,) 113; Chitty, (13 Am. ed.,) 320; Thomson on Bills, 211.

er the holder is bound to acquiesce in an acceptance by an agent, as such an acceptance would multiply the proofs of the holder's title.<sup>1</sup> But if the agency were clear, we think the holder would be bound to take the agent's acceptance—acceptance by procuration, as it is termed.<sup>2</sup> If the holder takes an acceptance from one unduly alleging his agency, and without giving notice to antecedent parties, they will be released, if the principal refuses to ratify the act.<sup>3</sup>

#### EXPRESS ACCEPTANCE—WHAT AMOUNTS TO.

§ 8. As to express acceptance it is usually made by writing the word "*accepted*," across the face of the bill, (which the drawee may do with pen or pencil,) and adding the acceptor's signature. But by the law merchant neither the word nor the signature is necessary—"accepted"<sup>4</sup> without a signature, "seen,"<sup>5</sup> "honored,"<sup>6</sup> "presented,"<sup>7</sup> "I will pay the bill,"<sup>8</sup> or writing the day and month when presented;<sup>9</sup> or a written direction of the drawee on the bill to some other person to pay it,<sup>10</sup> or the signature of the drawee alone,<sup>11</sup> or the word "*accepted*."<sup>12</sup>

It has been held that where the statute law requires that acceptance shall be in writing on the bill, and signed by the party to be charged thereby, or his agent, that such requisition is complied with by the acceptor's writing his name across the face of the bill.<sup>13</sup>

It has been said that, "I will *not* accept this bill," written across the face of it, amounts to acceptance,—but it is impossible to suppose that any such decision will be rendered unless, indeed, the "not" were unintentionally inserted.<sup>14</sup>

#### IMPLIED ACCEPTANCE.

§ 9. So acceptance may be implied from the conduct of the drawee. Any conduct of the drawee (as statute intervening) from which the holder is justified in drawing the conclusion that the

<sup>1</sup>Coore vs. Callaway, 1 Esp., 115; Byles, 113; Chitty, 321.

<sup>2</sup>Beawes No. 87; Thomson on Bills, 211.

<sup>3</sup>Thomson, 211; Chitty, 321.

<sup>4</sup>Phillips vs. Frost, 29 Maine, 77; Dufaur vs. Oxenden, 1 Moody & R., 90.

<sup>5</sup>Barnet vs. Smith, 10 Foster 256; Spear vs. Pratt, 2 Hill, 582.

<sup>6</sup>Story on Bills, § 243; 1 Pars. N. & B., 232

<sup>7</sup>Anonymous Comb., 491.

<sup>8</sup>Ward vs. Allen, 2 Met., (Mass.,) 53; Leach vs. Buchanan, 4 Esp., 226.

<sup>9</sup>1 Pars. N. & B., 243.

<sup>10</sup>Moore vs. Wilby, Buller N. & P., 270; Harper vs. West, 1 Cr. C. C., 192.

<sup>11</sup>Spear vs. Pratt, 2 Hill, 582; Wheeler vs. Webster, 1 E. D. Smith, 1.

<sup>12</sup>Miller vs. Butler, 1 Cr. C. C., 170.

<sup>13</sup>Spear vs. Pratt, 2 Hill, 582.

<sup>14</sup>Bayley on Bills, 164; 1 Parsons N. & B., 283.

drawee intended to accept the bill, and intended to be so understood, will be regarded as an acceptance.<sup>1</sup> Thus, keeping a bill a considerable length of time, without returning an answer, may, under circumstances, be considered as an acceptance; especially if the drawee be informed that delay will be so considered, and there be an inference from the language of the drawee that he intended an acceptance.<sup>2</sup>

The cases have been decided upon special circumstances, and the mere detention for an unseasonable time is not considered as amounting to an acceptance.<sup>3</sup>

§ 10. A letter from the drawee to the drawer, the latter being dead, but the former not knowing it, has been held an acceptance, on the ground that it was so intended.<sup>4</sup> The death of the drawee is no revocation of a bill, if it has passed into the hands of a *bona fide* holder.<sup>5</sup>

§ 11. After a refusal to accept, neither the detention or destruction of the bill will amount to acceptance;<sup>6</sup> and unless the bill had in fact been accepted before it was destroyed, it seems that the destruction of it will not amount to acceptance, there being other appropriate remedies—for example, trover for destruction of the bill.<sup>7</sup>

It has been held, that if the drawee of a bill, drawn and indorsed for his accommodation, procure the same to be discounted, and promise to pay it at maturity, he constitutes himself an acceptor;<sup>8</sup> and that a promise to pay a bill at maturity amounts to an acceptance.<sup>9</sup> Also, that authority “to draw on us or either of us,” and “we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts,” binds the signers jointly and severally to the payment of acceptances by each other.<sup>10</sup>

<sup>1</sup> Pars. N. & B., 287; Byles on Bills, (Sharswood's ed.,) 315; *Billing vs. Devaney*, 3 M. & G., 565.

<sup>2</sup> Chitty on Bills, 324; Byles on Bills, (Sharswood's ed.,) 315; Bayley on Bills, 193; *Harvey vs. Martin*, 1 Camp., 425; see *Jeune vs. Ward*, 2 Stark, 326; note 1 B. & Ald., 653.

<sup>3</sup> *Mason vs. Barff*, 2 B. & Ald., 26; *Koch vs. Howell*, 6 Watts & S., 350.

<sup>4</sup> *Billing vs. Devaux*, 3 Man. & G., 205.

<sup>5</sup> *Cutts vs. Perkins*, 12 Mass., 206; Chitty on Bills, 282, 287; Thomson on Bills, (Wilson's ed.,) 216.

<sup>6</sup> *Jeune vs. Ward*, 1 B. & Ald., 653.

<sup>7</sup> 1 Pars. N. & B., 285; Story on Bills, § 248. In New York, destruction of the bill amounts to an acceptance: Edwards on Bills, 417, citing English cases.

<sup>8</sup> *Bank of Rutland vs. Woodruff*, 34 Vt., 89.

<sup>9</sup> *Spaulding vs. Andrews*, 12 Wright, 411.

<sup>10</sup> *Michigan State Bank vs. Pecks*, 2 Williams, 200.

If a party accept a bill in which no drawee is named, it will be regarded as acknowledging that he was the drawee, and will operate as a complete accepted instrument.<sup>1</sup>

#### DRAWEE MAY DELIBERATE TWENTY-FOUR HOURS WHETHER OR NOT TO ACCEPT.

§ 12. When the bill is presented to the drawee for acceptance, he is entitled, if he desires it, to a reasonable time to examine into the state of his accounts with the drawer, and deliberate whether or not he will honor the bill. To afford him this opportunity, which it may be very necessary for him to avail of, he is allowed twenty-four hours, and it is usual to leave the bill with him for that period;<sup>2</sup> though it has been said that if the post goes out in the meantime the bill should be protested immediately if not accepted, and notice of dishonor sent.<sup>3</sup> But this rule is too rigid,<sup>4</sup> especially in countries like the United States, in which the mail facilities are so great; nor does it consist with the rule allowing a whole day for preparation of notice.

But if the drawee refuses to accept within the twenty-four hours, the bill must be protested immediately;<sup>5</sup> and if at the end of twenty-four hours the drawee does not signify his acceptance, protest must be immediately made, and notice given.<sup>6</sup>

#### WHEN ACCEPTANCE MAY BE MADE.

§ 13. The acceptor may write his acceptance before the bill is drawn, and deliver it in blank to be filled up; and in that event it will date, and the Statute of Limitations begin to run, from the time it is thus completed.<sup>7</sup> It is not necessary that the bill should be

<sup>1</sup>Wheeler *vs.* Webster, 1 E. D. Smith, 1; 1 Pars. N. & B., 289; Gray *vs.* Milner, 8 Taunt., 739; 3 J. B. Moore, 90; Davis *vs.* Clarke, 6 Q. B., 16; Thomson on Bills, (Wilson's ed.,) 212.

<sup>2</sup>Connelly *vs.* McKean, 64 Penn. St. R., 113; Case *vs.* Burt, 15 Mich., 82; Overman *vs.* Hoboken City Bank, 31 N. J. L. R., (3 Vrooms,) 563; Montgomery County Bank *vs.* Albany City Bank, 8 Barbour, 399; 1 Parsons on Contracts, 266; Bellasis *vs.* Hester, 1 Ld. Ray'd, 280; Ingram *vs.* Forster, 2 J. P. Smith, 242; Byles on Bills, (Sharswood's ed.,) 303; 1 Pars. N. & B., 348; Bayley on Bills, (Am. ed.,) 139; Story on Bills, § 237; Edwards, 400; Chitty on Bills, (13 Am. ed.,) 317, 321.

<sup>3</sup>Bellasis *vs.* Hester, 1 L'd Ray'd, 280; Thomson on Bills, (Wilson's ed.,) 213; Beawes, No. 17; Byles on Bills, (Sharswood's ed.,) 303.

<sup>4</sup>Morrison *vs.* Buchanan, 6 C. & P., 18; Chitty on Bills, (13 Am. ed.,) 317-321.

<sup>5</sup>1 Pars. N. & B., 348; Chitty on Bills, (13 Am. ed.,) 317; Edwards, 400.

<sup>6</sup>Ingram *vs.* Foster, 2 J. P. Smith, 242.

<sup>7</sup>Montague *vs.* Perkins, 22 Eng. L. & Eq., 516; Molloy *vs.* Delves, 4 Car. & P., 492; Bank of Limestone *vs.* Penick, 5 T. B. Monroe, 25.

drawn by the same person to whom the acceptor handed the blank acceptance.<sup>1</sup> And where the blank acceptance was filled up after the lapse of twelve years, and, as the jury found, after the lapse of a reasonable time, the acceptor was held liable to a *bona fide* indorsee.<sup>2</sup> Furthermore, the acceptor in blank will be liable for any amount for which the bill is filled up when it has passed into the hands of any *bona fide* holder, without notice that his authority has been exceeded.<sup>3</sup>

Acceptance dates from delivery until which time it is revocable;<sup>4</sup> but if not in the hands of the acceptor, and accepted verbally, this principle would have no application.<sup>5</sup>

An acceptance may be also after the bill has been discounted, and is just as binding then as if made before.<sup>6</sup>

If there is a *settled usage* on the part of the bank to which a bill is sent for collection, not to note it as dishonored, after calling on the drawee for acceptance, it will be a good defense against the charge of negligence.<sup>7</sup>

§ 14. There may be acceptance of a bill after it has become payable, and after protest, in which case the bill is regarded as payable on demand.<sup>8</sup> And after acceptance has been once refused, the drawee may afterwards accept, and bind himself as acceptor—but he can not bind the other parties unless the bill was duly protested.<sup>9</sup>

Death of the drawer is no revocation of a bill in the hands of a *bona fide* holder; and therefore, after his death it may be accepted by the drawee, although he has knowledge of that fact.<sup>10</sup> The presumption is that a bill was accepted before maturity, and within a reasonable time after date.<sup>11</sup>

<sup>1</sup>Schultz *vs.* Ashley, 7 C. & P., 99, (32 E. C. L. R.)

<sup>2</sup>Montague *vs.* Perkins, 22 Eng. L. & Eq., 516.

<sup>3</sup>Bank of Commonwealth *vs.* Curry, 2 Dana, 142; Moody *vs.* Threlkeld, 13 Georgia 55; Byles on Bills, (Sharswood's ed.,) 308.

<sup>4</sup>Cox *vs.* Troy, 5 B. & Ald., 474; but see Thornton *vs.* Dick, 4 Esp., 270.

<sup>5</sup>1 Parsons N. & B., 291.

<sup>6</sup>Mechanics Bank *vs.* Livingston, 33 Barbour, 458.

<sup>7</sup>Bank of Washington *vs.* Triplett, 1 Peters, 25.

<sup>8</sup>Billing *vs.* Devany, 3 Man. & G., 555; Christie *vs.* Pearl, 7 M. & W., 491; Jackson *vs.* Pigot, 1 L'd Ray'd, 364; Mutford *vs.* Walcot, *Id.*, 374; Chitty on Bills, 313; Bayley, 181; Story, § 250; Williams *vs.* Winans, 2 Green, 339; Stockwell *vs.* Bramble, 3 Ind., 428; Bank of Louisville *vs.* Ellery, 34 Barb., 630.

<sup>9</sup>Wynne *vs.* Raikes, 5 East, 514; Thomson on Bills, (Wilson's ed.,) 214.

<sup>10</sup>Cutts *vs.* Perkins, 12 Mass., 206.

<sup>11</sup>Roberts *vs.* Bethell, 12 C. B., 778, (74 E. C. L. R.)



## ACCEPTANCE NEED NOT BE ON THE BILL.

§ 15. An acceptance may be, by the law merchant, on a separate paper, or by letter.<sup>1</sup> Thus a written promise to accept an existing bill, or "that it shall meet with due honor;" or that the drawee "will accept or certainly pay it"—or any other equivalent language has been held to amount to acceptance.<sup>2</sup> But if the language be equivocal, if it be merely stated "your bill shall have attention," it is insufficient.<sup>3</sup>

## EITHER OF A SET OF BILLS MAY BE.

§ 16. Either of a set of bills may be presented for acceptance, and if not accepted, a right of action accrues immediately upon due notice against all the antecedent parties to the bill, without any others of the set being presented.<sup>4</sup> But the drawee should accept but one of the set, for if two or more of the set should be accepted, and should come into the hands of different holders, and the acceptor should pay one, he might also be obliged to pay the others also.<sup>5</sup>

Where one of a set which was made and accepted in blank is filled up, varying from the others, not only in date and amount, but also as to time and place of payment, and is negotiated by the correspondent of the acceptor to a *bona fide* party, without notice that such act was done without authority, the acceptor is liable to such *bona fide* holder.<sup>6</sup>

It seems that if the drawee accept two or more parts of a set of bills, and the several parts come into the hands of different *bona fide* holders without notice, he will be liable to pay on each part.<sup>7</sup>

## WHAT BILLS DO NOT NEED ACCEPTANCE.

§ 17. There are some bills which do not need acceptance—or rather in which the act of drawing itself constitutes acceptance. Thus, a bill drawn without being addressed to any drawee,<sup>8</sup> or drawn

<sup>1</sup>Billing *vs.* Devany, 3 Man. & G., 565; Hatcher *vs.* Stalworth, 25 Miss., 376; Fairlie *vs.* Herring, 3 Bing. R., 625; Pierson *vs.* Dunlap, Cowp., 571; Wynne *vs.* Raikes, 5 East, 514; Grant *vs.* Hunt, 1 Man., Grang. & S., 44; McEver *vs.* Mason, 10 Johns., 207; Greele *vs.* Parker, 5 Wend., 414.

<sup>2</sup>*Ibid.*

<sup>3</sup>Rees *vs.* Warwick, 2 B. & Ald., 113.

<sup>4</sup>Downes *vs.* Church, 13 Pet., 207; Bank of Pittsburg *vs.* Neal, 22 Howard, 108.

<sup>5</sup>Bank of Pittsburg *vs.* Neal, 22 Howard, 109.

<sup>6</sup>Bank of Pittsburg *vs.* Neal, 22 Howard, 97.

<sup>7</sup>Bank of Pittsburg *vs.* Neal, 22 Howard, 96.

<sup>8</sup>Marion, &c., R. Co. *vs.* Hodge, 9 Ind., 163; Dongal *vs.* Cowles, 5 Day, 511.

by a party upon himself,<sup>1</sup> or by a partner upon the firm of which he is a member, for partnership purposes.<sup>2</sup> A bill drawn by the President of a corporation in its behalf, on the Treasurer thereof, would be a bill drawn by the corporation on itself, and hence, not need acceptance;<sup>3</sup> but if not drawn on the Treasurer in his official character, it would be otherwise.<sup>4</sup>

### VERBAL ACCEPTANCES.

§ 18. By the law merchant, there is no doubt that a verbal acceptance is binding on the drawee to the payee, and to any indorsee to whom the fact of such acceptance is communicated, and who takes the bill on the faith thereof.<sup>5</sup> Verbal acceptance may be inferred from circumstances. Thus, if the drawee say, "Leave your bill and call for it to-morrow, and it shall be accepted," or "I will accept it," or "Leave the bill, and I will accept it," or "Send the bill to my counting-house, and I will give directions for its being accepted," if the bill be sent,<sup>6</sup> it amounts to acceptance.

But where the drawee, on being presented with a bill payable at sight, said: "I will pay it, but I can not now. I'll give you a bill at three months," it was held no acceptance;<sup>7</sup> and so "the bill shall have attention,"<sup>8</sup> and "there is your bill, it is all right,"<sup>9</sup> do not amount to acceptance.

To constitute a verbal acceptance, the language expressing or importing it, must be used to the drawer or holder, and it will be insufficient if used to a third person; and if the drawee say to a third person, "I must accept and pay the bill," or "I shall have to accept or pay it," it is no acceptance.<sup>10</sup>

<sup>1</sup>*Hasey vs. White Pigeon Company*, 1 Doug., (Mich.,) 193; *Cunningham vs. Wardwell*, 3 Fair, c. 466; *Roach vs. Ostler*, 1 Man. & R., 120; cited, 1 Pars., N. & B., 288.

<sup>2</sup>*Dongal vs. Cowles*, 5 Day, 511; *Miller vs. Thompson*, 3 Man. & G., 576.

<sup>3</sup>*Hasey vs. White Pigeon Company*, 1 Doug., (Mich.,) 193.

<sup>4</sup>*Halsted vs. the Mayor*, 5 Barb., 218.

<sup>5</sup>*Williams vs. Winnans*, 2 Green, N. J., 339; *Ontario Bank vs. Worthington*, 12 Wend., 593; *Leonard vs. Mason*, 1 Wend., 522; *Fisher vs. Beckwith*, 19 Vt., 31; *Bank of Rutland vs. Woodruff*, 34 Vt., 89; *Martin vs. Bacon*, 4 Comst., 132; *Spaulding vs. Andrews*, 48 Penn., St., 411; *Ward vs. Allen*, 2 Metc., (Mass.,) 53; *Grant vs. Shaw*, 16 Mass., 341; *Edson vs. Fuller*, 2 Foster, 183; *Barnet vs. Smith*, 10 Id., 256; *Arnold vs. Sprague*, 34 Vt., 402; *Stockwell vs. Bramble*, 3 Ind., 428; *Bird vs. McElwaine*, 10 Ind., 40; *Fairlee vs. Herring*, 3 Bing., 625; 11 J. B. Moore, 520; *Sproat vs. Mathews*, 1 T. R., 182.

<sup>6</sup>*Bayley on Bills*, 189; *Chitty*, 327; *Story on Bills*, § 246.

<sup>7</sup>*Reynolds vs. Peto*, 11 Exch. R., 410, S. C.; 33 Eng. L. & Eq. R., 481.

<sup>8</sup>*Rees vs. Warwick*, 2 B. & Ald., 113; unless in course of dealing so considered.

<sup>9</sup>*Powell vs. Jones*, 1 Est., 17.

<sup>10</sup>*Martin vs. Bacon*, 2 South Car., 132; *Anderson vs. Heath*; 4 M. & S., 303; *Peck vs.*

WRITTEN AND VERBAL PROMISES TO ACCEPT EXISTING AND  
NON-EXISTING BILLS IN ENGLAND.

§ 19. In England a written,<sup>1</sup> or parol<sup>2</sup> promise to accept an existing *foreign bill*, is considered equivalent to an acceptance; but as to inland bills the statute 1 & 2, Geo. IV, provides that no acceptance shall charge any person, unless in writing on the bill; but such acceptance may be written thereon before the bill is drawn.<sup>3</sup>

It is settled there that there can not be an oral promise to accept a non-existing bill, although the bill be discounted by the drawer on the faith of such promise to accept;<sup>4</sup> and a written promise to accept a non-existing bill, (it must be foreign of course,) is not binding, unless communicated to the party who takes the bill on the faith of such promise.<sup>5</sup>

§ 20. It has been held that an authority from one person to another to draw bills on him is virtually an acceptance of all bills drawn in pursuance of such authority;<sup>6</sup> and where one gave written authority to his agent to adjust certain business and draw on him for the moneys necessary, it was held to amount to an acceptance by the principal of drafts drawn with the assent of the agent upon him.<sup>7</sup>

§ 21. It was said by the United States Supreme Court in the leading case of *Coolidge vs. Payson*, 2 Wheaton, 66, that "a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, *if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise.*" This decision has been considered as limiting such acceptances to the cases in which the bill has been taken on the faith of them, and "The rule laid down," as said in *Boyce vs. Edwards*, 4

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Cochran, 7 Pick, 134; *Mendizabal vs. Machado*, 6 Car. & P., 219; S. C., 3 M. & S., 841.

<sup>1</sup>*Wynne vs. Raikes*, 5 East, 514; *Clarke vs. Cock*, 4 East, 57; *Powell vs. Mennier*, 1 Atk., 611.

<sup>2</sup>*Mendizabal vs. Machado*, 6 Car. & P.; 8 Moore & S., 841; *Pierson vs. Dunlap*, 2 Cowp., 571; *Miln vs. Prest*, 4 Camp., 393.

<sup>3</sup> Byles on Bills, 309.

<sup>4</sup>*Johnson vs. Collings*, 1 East, 98; *Bank of Ireland vs. Archer*, 11 M. & W., 383, (1843;) overruling, *Miln vs. Prest*, 1 Holt., 181, (1816.)

<sup>5</sup>*Pierson vs. Dunlap*, Cowp., 571; *Mason vs. Hunt*, 1 Doug., 296; *Miln vs. Prest*, 4 Camp., 393; *Bank of Ireland vs. Archer*, 11 M. & W., 383.

<sup>6</sup>*Van Reimedyk vs. Kane*, 1 Gallison, 630; *Banerger vs. Horey*, 5 Mass., 23; *Mayhew vs. Prince*, 11 Mass., 55; *Wallace vs. Agry*, 4 Mason, 336; *Bissell vs. Lewis*, 4 Mich., 450.

<sup>7</sup>*Gates vs. Parker*, 43 Maine, 544.

Peters, 111, "requires the authority to be pointed at the specific bill or bills to which it is intended to be implied; in order that the party who takes the bill upon the credit of such authority, may not be mistaken in its application."<sup>1</sup>

And the letter in this case having been written two years before the bill was drawn, and not describing it, was held no acceptance.<sup>2</sup> In *Greele vs. Parker*, 5 Wend., 414, it was said by Chancellor Walworth, "It is a well-settled rule of the commercial law of this country, and of most of the nations of Europe, where it has been recently altered by statute, that an unconditional promise in writing to accept a bill, if made within a reasonable time *before or after* the date of the bill, and describing the same in terms not to be mistaken, is a virtual acceptance thereof, in favor of any person to whom such acceptance has been shown, and who has received the bill for a valuable consideration on the faith of such promise." In *McEvers vs. Mason*, 10 Johns., 207, it was held that an indorsee who had taken a bill in ignorance of the promise to accept, could not recover on such promise, taking the same distinction as the foregoing cases, which seems well founded.

It has been held that a promise to accept *an existing bill* may be sued on as an acceptance, whether the holder took it on the credit of such promise or not;<sup>3</sup> but this ground does not seem to be well taken, and the contrary is well maintained in the case of *Exchange Bank of St. Louis vs. Rice*, 98 Mass., 288, in which it was held that a promise to accept a bill contained in a letter from the drawee to the drawer, *written after the bill has been negotiated*, will not enable the holder to sue the drawee as acceptor, even where the bill was expressed to be drawn "against twelve bales of cotton," and had been discounted on the credit thereof.<sup>4</sup>

## VERBAL PROMISE TO ACCEPT BILLS ON THE UNITED STATES.

§ 22. Whether or not a verbal promise to accept a bill already drawn, or thereafter to be drawn, may be sued on as an acceptance, has been a question much debated in many of the States.

<sup>1</sup>See also *Goodrich vs. Gordon*, 15 Johns., 6; *Wilson vs. Clements*, 3 Mass., 1; *Stover vs. Logan*, 9 Mass., 55; *Ontario Bank vs. Washington*, 5 Wend., 593; *Carrollton Bank vs. Fayleur* 16 La., 490; *Vance vs. Ward*, 2 Dana, 95.

<sup>2</sup>See also *Wilson vs. Clements*, 3 Mass., 1; *Schimmelpennich vs. Bayard*, 1 Pat., 264; *Townsley vs. Summerall*, 2 Pet., 170; *Wildes vs. Savage*, 1 Story, 22; *Russell vs. Wiggin*, 2 Story, 213; *Bayard vs. Lathy*, 2 McLean, 462.

<sup>3</sup>*Jones vs. Bank of Iowa*, 34 Ill., 313; *Read vs. Marsh*, 5 B. Monroe, 8.

<sup>4</sup>See also, *Lewis vs. Cramer*, 3 Md., 265; *Steman vs. Harrison*, 6 Wright, 49.

Without the intervention of statute, the better opinion seems that a verbal promise to accept an existing or non-existing bill will be binding, if communicated to the holder, and he takes the bill on the faith thereof. In *Bank of Michigan vs. Ely*, 17 Wend., 508, it was said that a parol promise (before the statute requiring acceptance in writing) to accept a future bill was not binding, *unless* the holder took it on the faith thereof. The converse is implied in this opinion, and has been so held in a number of cases.<sup>1</sup>

§ 23. In those States where there is no statute regulating acceptance, the question of the validity of a verbal acceptance, or promise to accept, may become referable to the Statute of Frauds. Mr. Conway Robinson, in his *Practice* (Vol. 2, new ed., p. 153,) observes: "The parol acceptance being no more than a parol promise, it seems to the author that whether or no the acceptor can be charged on such promise may depend on whether the promise is to pay a debt of his own, or to answer for the debt of another. For, in the latter case, no action can be lawfully brought unless the promise or some memorandum or note thereof be in writing, and signed by the party, to be charged thereby, or his agent. Such is the provision of the Code of Virginia." This view was taken in *Plummer vs. Lyman*, 49 Maine, 229, in which it was held that a parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there was no privity, was invalid under the Statute of Frauds, as a promise to pay the debt of another.

In *Townsley vs. Sumrall*, 2 Peters, 170, the United States Supreme Court held, that if a person verbally undertake to accept a bill in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it, and the bill is purchased upon the credit of such promise for a sufficient consideration, such promise to accept was binding upon the party, and that it was an original promise, and not a promise to pay the debt of another within the Statute of Frauds. In this case the suit was for damages for breach of the contract, and therefore it was not decided that such a promise constituted acceptance.<sup>2</sup>

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<sup>1</sup>*Williams vs. Winans*, 2 Green, N. J., 339; *Crowell vs. Van Bibber*, 18 La. Annual, 637. To the contrary: *Kennedy vs. Geddes*, 8 Porter, (Ala.,) 263; *Strobecker vs. Cohen*, 1 Speers, 349.

<sup>2</sup>Story, J., said: "This is not a case falling within the object, or mischief of the Statutes of Frauds. If A. says to B. pay so much money to C., and I will re-pay it to you, it is an original, independent promise; and if the money is paid on the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration moving between the immediate parties to the

§ 24. If, when the bill is presented the drawee refuse to accept, but promised to pay the payee the amount by a given day, the latter can not sue the drawee, although he was in funds and should have accepted.<sup>1</sup>

#### BREACH OF PROMISE TO ACCEPT A BILL.

§ 25. While a general authority to draw bills upon a party, without specification of the particular bills, will not authorize a suit against the party as an acceptor, even when a third person has taken the bill on the faith of such authority, yet the drawer may sustain an action against the drawee for breach of promise to accept.<sup>2</sup> The evidence in the two cases would be materially different. In an action against the drawee as acceptor, it should apply to the particular bill alleged to have been accepted; while in an action for breach of promise to accept, the authority to draw might be collected from circumstances and extended to all bills coming fairly within the scope of promise.<sup>3</sup> So there may be a suit for damages upon a verbal promise to accept a bill when based upon an adequate consideration.<sup>4</sup>

If by promise and liability to accept, a drawee induces the drawer to draw upon him, and then refuses to honor the bill, he will be liable for all damages incurred, including protest. In *Riggs vs. Lindsay*, 7 Cranch, S. C., 500, it appeared that the defendant had ordered the plaintiff to purchase salt for him, and draw on him for the amount, and he having so purchased and drawn, it was held that the defendant was bound to accept the bills; and having failed to do so, that the plaintiff was entitled to recover the amount of the bills with damages and costs of protest, upon a count for money paid and expended, and that the bills themselves were good evidence on that count.

It seems that if a person should write a factor that he had con-

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contract. Damage to the promisee constitutes as good a consideration as benefit to the promiser. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the Statute of Frauds, so as to embrace original and distinct promises made by different persons at the same time, upon the same general consideration: *D'Wolf vs. Raband*, 1 Pet., 476. \* \* \* The question whether a parol promise to accept a non-existing bill amounts to an acceptance of the bill when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance; and the point, whether it was an acceptance or not, does not appear to have been made in the court below."

<sup>1</sup>*Suff vs. Pope*, 5 Hill, 413.

<sup>2</sup>*Boyce vs. Edwards*, 4 Peters, 111.

<sup>3</sup>*Id.*

<sup>4</sup>*Towneley vs. Sumrall*, 2 Peters, 170.

signed him certain goods, and would draw a bill on the credit thereof for a certain amount, the factor, if he accepted the consignment, would be bound to accept the bill; and that the payee of such a bill could sue the factor as upon a breach of promise to accept.<sup>1</sup>

§ 26. The rule that the promise to accept, designating the specific bill amounts to an acceptance, seems applicable only to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for, in order to constitute an acceptance in the latter cases, a presentment is indispensable; since the time that the bill is to run can not be otherwise ascertained.<sup>2</sup> And a mere promise to accept without more, it is thought applies only to bills payable at the drawee's or payee's place of business.<sup>3</sup>

#### ABSOLUTE AND CONDITIONAL ACCEPTANCES.

§ 27. It is the right of the holder of the bill to require an absolute and unconditional acceptance; that is, an acceptance in conformity with the tenor of the bill—and may cause it to be protested unless it be so accepted.<sup>4</sup> The holder may, however, at his risk, take a conditional or qualified acceptance, and in such cases the acceptor will, if the condition be complied with, or the qualification admitted, be bound thereby; and the holder will likewise be bound by it;<sup>5</sup> the burden of proof is on the plaintiff to show performance of the condition;<sup>6</sup> and although absolute then it should be set out as conditional with an averment of performance.<sup>7</sup>

§ 28. Acceptances "to pay as remitted for;"<sup>8</sup> "to pay when in cash for the cargo of the ship *Thetis*;"<sup>9</sup> "to pay when goods consigned to me are sold;"<sup>10</sup> "to pay when a cargo of equal value is consigned to me;"<sup>11</sup> are examples of conditional acceptances. So where on presentment of bills for acceptance the drawee said he would have accepted them if he had had certain funds which he had not been able to

<sup>1</sup> 1 Pars., N. & B., 291.

<sup>2</sup> See Story on Bills, (Bennett's ed.,) § 249; Edwards on Bills, 414; Wildes *vs.* Savage, 1 Story, C. C. R., 28.

<sup>3</sup> Michigan State Bank *vs.* Leavenworth, 28 Vermont, 209.

<sup>4</sup> Bayley on Bills, 175.

<sup>5</sup> Smith *vs.* Abbot, Str., 1152; Julian *vs.* Shorbrook, 2 Wills, 9; Mitchell *vs.* Barring, 10 B. & C., 4; Ford *vs.* Angelrodt, 37 Misso., 50; Wintersmith *vs.* Post, 4 Zabriskie, 420.

<sup>6</sup> Read *vs.* Wilkinson, 2 Wash., C. C., 514; Gammon *vs.* Schmoll, 5 Taunt., 344; Mason *vs.* Hunt, 1 Deng., 297.

<sup>7</sup> Langston *vs.* Corry, 4 Camp., 176.

<sup>8</sup> Julian *vs.* Shobrooke, 2 Wills, 9.

<sup>11</sup> Mason *vs.* Hunt, 2 Deng., 297.

<sup>9</sup> Banbury *vs.* Lisset, 2 Stra., 1211.

<sup>10</sup> Smith *vs.* Abbott, 2 Stra., 1152.



obtain from France, but that when he did obtain them he would pay the bill, it was held a conditional acceptance.<sup>1</sup> And it has been held that the words "accepted payable on giving up a bill of lading" constituted a conditional acceptance, but not a further condition to the acceptor's liability that the bill of lading should be given up at the day of maturity of the bill.<sup>2</sup>

§ 28. If the holder take an acceptance varying in any respect from the tenor of the bill, he should give immediate notice to the antecedent parties, and then, should they adopt or acquiesce in such acceptance, their obligations would not be affected; but it seems that nothing but a protest for non-acceptance, in case of refusal to accept according to the tenor of the bill, will preserve the responsibility of all parties without such subsequent adoption or acquiescence.<sup>3</sup>

§ 29. If any conditions are annexed to an acceptance they should appear on its face. It has been laid down that acceptance may be rendered conditional by another contemporaneous writing,<sup>4</sup> but such condition could have no effect against a *bona fide* holder ignorant of it.<sup>5</sup> The terms of an acceptance in writing can not be varied by any contemporaneous parol agreement, as that is against the first principles of the law of evidence.<sup>6</sup>

Sometimes the words which make the acceptance conditional are in the bill or order itself, as in *Newhall vs. Clark*, 3 Cush., 376, where the order ran "Please pay, &c., out of the amount to be advanced to me, when the houses I am now erecting on your land are so far completed as to have the plastering done according to our contract," and in such case if the work were never done, the condition upon which the defendant would be bound, would not be complied with. And it matters not that the contract was cancelled by agreement with the acceptor, provided there was no fraud. The acceptance of an order payable "if in funds," is regarded as an admission that the acceptor has funds to meet it, and he can not afterwards allege want of consideration against the holder.<sup>7</sup>

<sup>1</sup>Byle's on Bills, 307; *Mendizabal vs. Machado*, 6 C. & P., 218; 25 E. C. L. R.; 3 M. & Scott, 841.

<sup>2</sup>Byles, 307; *Smith vs. Vertue*, 30 L. J. C. P., 56; 9 C. B. N. S., 214, (99 E. C. L. R.)

<sup>3</sup>Chitty on Bills, 307; Story § 240. But see *Bayley*, 254; Byles on Bills, (Sharpwood's ed.,) 316-18; *Russel vs. Phillips*, 14 Q. B., 891, (68 E. C. L. R.)

<sup>4</sup>*Bowerbank vs. Menteiro*, 4 Taunt., 884.

<sup>5</sup>*U. S. vs. Bank of Metropolis*, 15 Peters, 377; Chitty on Bills, ¶ 332; Story, § 240.

<sup>6</sup>*Adams vs. Wordley*, 1 M. & W., 347; *Besant vs. Cross*, 10 C. B., 896; (70 E. C. L. R.;) *Hoare vs. Graham*, 3 Camp., 57; *Haverin vs. Donnell*, 7 Smedes & M., 244.

<sup>7</sup>*Kemble vs. Lulle*, 3 McLean, 272.

§ 30. Where a bill was drawn by a contractor on the Postmaster General, and having been "accepted on condition that the drawer's contracts be complied with," was discounted by the defendants, it was held that such forfeitures as had occurred previous to such acceptance were not within the condition.<sup>1</sup> "I will see the within paid eventually," written on the back of a draft, was held a promise to pay in a reasonable time.<sup>2</sup>

#### ACCEPTANCE TO PAY "WHEN IN FUNDS."

§ 31. An acceptance to pay "when in funds," renders the drawee liable only when he has funds; though it has been held that this implied when the drawee has funds which the drawer has a present right to demand and receive, and that it did not apply to wages for daily labor earned after acceptance, and needed for the daily subsistence of the laborer.<sup>3</sup> "When in funds" means "when in cash," and available securities will not answer this condition until actually converted into money.<sup>4</sup> If the funds are not received in the acceptor's lifetime, but are collected by the administrator, the latter is liable as representative of the deceased;<sup>5</sup> but the addition of the word "administrator" to an acceptance does not make it a conditional one, nor qualify his liability.<sup>6</sup>

Where the acceptance is to pay out of the first money received, the acceptor is bound to pay from time to time, on reasonable request, such funds as he receives from the drawee; and a judgment for a certain sum which he received is no bar to another action for a sum subsequently received.<sup>7</sup>

If the holder receive an acceptance to be paid "when in funds," he can not resort to the drawer until the acceptor refuses to pay after he is in funds;<sup>8</sup> and the conditional acceptor will not be liable if the funds are intercepted, or compliance with the condition is prevented, by operation of law.<sup>9</sup>

In a suit to recover on such an acceptance, the burden of proof is

<sup>1</sup>United States *vs.* Bank of the Metropolis, 15 Pet., 377.

<sup>2</sup>Brannen *vs.* Henderson, 12 B. Monroe, 62.

<sup>3</sup>Wintermute *vs.* Post, 4 Zabriskie, 420.

<sup>4</sup>Campbell *vs.* Pettengill, 7 Greenl., 126.

<sup>5</sup>Swansey *vs.* Breck, 10 Al., 533; Gallery *vs.* Prindle, 14 Barb., 186; Owen *vs.* Ignor, 4 Cold., 15.

<sup>6</sup>Tassey *vs.* Church, 4 Watts & S., 346.

<sup>7</sup>Perry *vs.* Harrington, 2 Met., 368.

<sup>8</sup>Andrews *vs.* Baggs, Minor, 173; Campbell *vs.* Pettengill, 7 Greenl., 126; Knox *vs.* Reeside, 1 Miles, 294; Gallery *vs.* Prindle, 14 Barb., 186.

<sup>9</sup>Browne *vs.* Coit, 1 McCord, 408.

on the plaintiff to show that the acceptor is in funds;<sup>1</sup> and where a factor so accepted an order of a planter, it was held that he was only bound to pay out of the first funds coming to his hands, after deducting advances.<sup>2</sup> Evidence is admissible to explain a conditional acceptance when its full meaning does not appear. Thus, an acceptance payable "when the lumber is run to market," is conditional, and the circumstances require explanation. What lumber? What market? By whom, and when to be run to market? All these are proper inquiries to be made.<sup>3</sup>

### - QUALIFIED ACCEPTANCE.

§ 32. As an acceptance may vary from the tenor of the order by introducing a condition, so it may vary from it as to the *sum, time, place, or mode of, payment.*<sup>4</sup> Such an acceptance is generally called a *qualified acceptance*, and the same principles govern it as govern a conditional acceptance.

By receiving such qualified acceptance the holder discharges all antecedent parties, unless he obtains their consent.<sup>5</sup> Thus, if addressed to the drawees at their place of residence, and it is accepted, payable at a different town, it is a material variation if the holder receives it, and does not protest for non-acceptance;<sup>6</sup> but a bill addressed generally to the drawee, in a city, may be accepted, payable at a particular bank in the city.<sup>7</sup>

§ 33. A bill drawn payable at a certain time, may be accepted on condition of being renewed to a certain other time, and it will be properly declared on as payable at the time named in the acceptance.<sup>8</sup> If accepted as to part of the amount drawn for, it is a good acceptance as to such part;<sup>9</sup> and if accepted payable partly in money and partly in bills, it is a good acceptance as to the part payable in money.<sup>10</sup>

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<sup>1</sup>Owen vs. Lavine, 14 Ark., 389; Andrews vs. Baggs, Minor, 173; Knox vs. Reeside, 1 Miles, 294; Atkinson vs. Manks, 1 Cowen, 691.

<sup>2</sup>Hunter vs. Ingraham, 1 Strobbart, 271.

<sup>3</sup>Lamon vs. French, 25 Wisc., 37.

<sup>4</sup>Rogers vs. Poston, 1 Met., (Ky.), 643; Todd vs. Bank of Kentucky, 3 Bush, 62.

<sup>5</sup>Byles on Bills, 316; Chitty, 307; Story, § 204; Sebag vs. Abithol, 4 M. & Sel., 462.

<sup>6</sup>Niagara Bank vs. Fairman Co., 31 Barb., 403.

<sup>7</sup>Troy City Bank vs. Lauman, 19 N. Y., 477; Meyers vs. Standart, 11 Ohio, (N. S.), 29; Niagara Bank vs. Fairman Co., 31 Barb., 403.

<sup>8</sup>Russell vs. Phillips, 14 Q. B., 891; Clarke vs. Gordon, 3 Rich., 311.

<sup>9</sup>Weggersloff vs. Kerne, 1 Stra., 214; Thomson on Bills, (Wilson's ed.), 225.

<sup>10</sup>Petit vs. Benson, Comb., 452; 1 Pars. N. & B., 312.

## ACCEPTANCE FOR HONOR.

§ 34. There is a peculiar kind of acceptance called *acceptance for honor*. This most frequently happens when the original drawee, and the drawee *au besoin*, if any, refuse to accept the bill, in which case a stranger may accept the bill for the honor of some one of the parties thereto, which acceptance will inure to the benefit of all the parties subsequent to him for whose honor it was accepted.<sup>1</sup>

By the word stranger in this connection is meant any third person not a party to the bill. It seems that acceptance for honor may also be made by the drawee, who, if he does not choose to accept the bill drawn generally on account of the person in whose favor, or on whose account, he is advised it is drawn, he may accept it for the honor of the drawer, or of the indorsers, or of all or any of them.<sup>2</sup>

But if the drawee were bound in good faith to accept the bill, he can not change his relations to the parties, and accept it *supra protest*. For the honor of an indorser, he must either accept or refuse.

An acceptor *supra protest* for the honor of an indorser, may, however, recover against such indorser, though he accepted at the instance of the drawee, and as his agent, provided the indorser were not thereby damnified. The indorser might avail himself of any defense which he could have made, had the drawee accepted for his honor, and then sued upon the acceptance.<sup>3</sup> It is immaterial, indeed, as to the defenses which a drawer or indorser may make against an acceptor for honor, whether such acceptor acted at the instance of the drawer, or as the agent of the drawee.<sup>4</sup>

§ 35. While there can not be successive acceptors of a bill, generally speaking, there may be several acceptors *supra protest* for the honor of different parties<sup>5</sup>—that is, one may accept for the honor of the drawer, another for the honor of the first indorser, and another for the honor of the second indorser, and so on.<sup>6</sup>

And the acceptor *supra protest* may accept for the honor of any one, or all, of the parties to the bill; and his acceptance should designate for whose honor it was made, in which case it could be at once

<sup>1</sup> Bayley on Bills, 177; Story, § 255; *ex parte Wackerbarth*, 5 Ves., 574; *Kenig vs. Bayard*, 1 Peters, 250; *Hussey vs. Jacob*, 1 L'd Ray'd, 88; *May vs. Kelly*, 27 Ala., 497.

<sup>2</sup> *Schimmelpennich vs. Bayard*, 1 Peters, 264.

<sup>3</sup> *Kenig vs. Bayard*, 1 Peters, 250.

<sup>4</sup> *Gazzans vs. Armstrong*, 3 Dana, 554; *Wood vs. Pugh*, 7 Ohio, 156.

<sup>5</sup> *Chitty on Bills*, 375; *Story on Bills*, § 260; 1 Pars. N. & B., 315; *Byles on Bills*, (Sharswood's ed.,) 403; *Beawes*, 33.

<sup>6</sup> *Chitty on Bills*, 376; *Story on Bills*, § 260; *Byles on Bills*, (Sharswood's ed.,) 403.

perceived for whose benefit it enured.<sup>1</sup> If the acceptance do not specify for whose honor it was made, it will be construed to be for the honor of the drawer;<sup>2</sup> and if for the honor of the bill, or of all the parties, it should be so expressed.<sup>3</sup> By his acceptance for honor, the acceptor has recourse against the party for whose honor he accepts, and all parties whom the latter would have recourse against.<sup>4</sup> But the acceptor for the honor of the drawer can not recover against him without proof of a presentment for acceptance or payment, and refusal and notice to the drawer.<sup>5</sup>

As to the method of acceptance for honor, it is in this wise: the acceptor for honor, or *supra protest*, appears before a Notary Public, witnesses and declares that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will pay it at the appointed time. And then he subscribes his name to the words, "Accepted *supra protest* for the honor of A. B.," or, as is more usual, "Accepts S. P."<sup>6</sup>

#### LIABILITY OF ACCEPTOR FOR HONOR.

§ 36. The acceptor for honor, is regarded in the light of an indorser; and, therefore, at maturity, the bill must be again presented to the drawee, and if still dishonored by him, it should be a second time protested, and notice given to the acceptor for honor, otherwise he will be discharged. The undertaking of the acceptor, *supra protest*, is not an absolute engagement to pay at all events, but only a collateral, conditional agreement to pay if the drawee do not.<sup>7</sup>

It is the duty of the acceptor for honor, to notify the fact immediately to the person for whose honor he accepts.<sup>8</sup>

If he accepts for the honor of the drawer only, he will in general, have no recourse against the indorsers; and if for the honor of an indorser, he will have no recourse against a subsequent indorser—

<sup>1</sup>Pars. N. & B., 313-14.      <sup>2</sup>*Ibid*; Bayley, 177.

<sup>3</sup>Cazzam vs. Armstrong, 3 Dana, 554.

<sup>4</sup>Byles on Bills, (Sharswood's ed.,) 406.

<sup>5</sup>Baring vs. Clark, 19 Pick., 220.

<sup>6</sup>Thompson on Bills, (Wilson's ed.,) 323; Byles on Bills, (Sharswood's ed.,) 402; Chitty, (13 Am. ed.,) 387.

<sup>7</sup>Hoare vs. Cazenove, 16 East, 391, in which Lord Ellenborough said: "It is an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor." Williams vs. Germaine, 7 B. & C., 468; (14 E. C. L. R.,) Schopeld vs. Bayard, 3 Wend., 488; Lenox vs. Everett, 10 Mass., 1; Byles on Bills, (Sharswood's ed.,) 403-406.

<sup>8</sup>Chitty, 375; Story on Bills, § 259.

the exception arising in cases where the person for whose honor he accepts the bill might have recourse against either, as when he is an accommodation drawer or indorser.

§ 37. The holder is in no case bound to take an acceptance for honor;<sup>1</sup> but if he receives it, and it is for the honor of a particular party, he can not sue such party until the maturity of the bill, and its dishonor by the acceptor *supra protest*.<sup>2</sup> But if the acceptance is for the honor of all the parties to the bill, he can not sue any of them until it has matured and been dishonored.<sup>3</sup>

The acceptance for honor is only allowable when the bill has been protested for non-acceptance or for better security, and not before, and hence it is called acceptance *supra protest*.

§ 38. There is another species of acceptance for honor which occurs after acceptance and before the maturity of the bill, when the acceptor absconds, or becomes a bankrupt or insolvent.<sup>4</sup> In this case, the holder is not bound to protest the bill, and his neglect to do so will not affect his remedy against any prior party.<sup>5</sup> But he may make protest if he choose to do so, and it is then called protest for better security.<sup>6</sup>

§ 39. There appears to be a conflict of opinion as to the extent of the admission of the acceptor *supra protest*. According to a recent eminent author, the acceptor *supra protest* does not admit the genuineness of the signature of any party for whose honor the acceptance

<sup>1</sup>Chitty, 376; Mitford *vs.* Walcott, 12 Mod., 410; Lord Raymond, 575; Gregory *vs.* Walcup Com., 76; Pillan *vs.* Van Miesop, 3 Barr, 1663; Byles on Bills, (Sharpwood's ed.,) 403.

<sup>2</sup>Williams *vs.* Germaine, 7 B. & C., 468; 1 Man. & R., 394.

<sup>3</sup>Story on Bills, § 258; Chitty, p. 375.

<sup>4</sup>Chitty on Bills, 374; Bayley, 176; Story, § 255.

<sup>5</sup>*Ex-parte* Wackerbarth, 5 Ves., 574.

<sup>6</sup>In Chitty on Bills, p. 374, it is said: "The custom of merchants is stated to be, that, if the drawee of a Bill of Exchange abscond before the day when the bill is due, the holder may protest it in order to have better security for the payment, and should give notice to the drawer and indorsers, of the absconding of the drawee; and, if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also in such case, protest for better security; but the acceptor is not, on account of the bankruptcy of the drawer, compellable to give this security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers; and its principal use appears to be, that, by giving notice to the drawers and indorsers of the situation of the acceptor, by which it is become improbable that payment will be made, they are enabled by other means, to provide for the payment of the bill when due, and thereby prevent the loss of re-exchange, &c., occasioned by the return of the bill. It may be recollected, that, though the drawer or indorsers refuse to give better security, the holder must, nevertheless, wait till the bill be due before he can sue either of those parties."

is given, not even the drawer's, and therefore he could recover back money paid to the holder if the bill turned out to be a forgery.<sup>1</sup> The language of the case cited in support of this doctrine would seem to sustain it; but confined to the point decided, it determines no more than that acceptance for the honor of an *indorser* does not admit *his* signature.<sup>2</sup>

The reasoning of the Judge which leads to this conclusion, however, would go to the full extent of the rule laid down by Professor Parsons. But it is at least subject to this modification, that one who accepts for the honor of the drawer is estopped from denying that the bill is a valid bill; and, consequently, it would not be competent for him to set up as a defense to an action by an indorsee that the payee is a fictitious person, and that he was ignorant of the fact at the time he accepted the bill.<sup>3</sup>

Why, indeed, the acceptor, *supra protest* should not be bound by the same rules which apply to an ordinary acceptor in the usual course of business, we can not perceive. It is his own voluntary

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<sup>1</sup>Parsons' N. & B., 323.

<sup>2</sup>Wilkinson vs. Johnson, 3 B. & C., 428. Abbott, C. J., said: "A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent for whose honor the payment is asked, is actually on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in *fact*, though no assertion may be made in *words*. And the fault, if he pays on a forged signature, is not wholly and entirely his own; but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the quantum; yet where there is any fault in the other party, and that other party can not be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, while the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches."

<sup>3</sup>Phillips vs. Thurn, 18 Com. B., (N. S.,) 694, (1865,) Erle, C. J., said: "I take it to be clear that if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer. \* \* \* \* \* It seems to me there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think that he is equally bound to admit that the bill is a valid bill."



act, and unless he has been imposed upon by the holder of the bill to such an extent as to warrant a defense on the distinct ground of fraud, he should, we think, be held up to the strict performance of his engagement, and estopped from denying any fact—such as the validity of the signatures of parties—which it pre-supposes.<sup>1</sup> Certainly when the bill has passed into the hands of a *bona fide* holder for value after the acceptance *supra protest* he could not then be permitted to open the question of forgery.<sup>2</sup>

#### ACCEPTANCES PAYABLE AT A PARTICULAR PLACE.

§ 40. Before the statute 1 & 2 Geo. IV, c. 78, was enacted it was a point much disputed whether a bill or note drawn or made payable at a particular place—or a bill accepted payable at a particular place—should be necessarily presented at such place in order to charge the acceptor, maker, or other parties. Finally it was decided in the House of Lords that an acceptance payable at a particular place was a qualified acceptance, rendering it necessary in an action against the acceptor to aver and prove presentment at such place.<sup>3</sup> This led to the passage of the statute 1 & 2 Geo. IV, above referred to, called Sergeant Onslow's Act, which provided that an acceptance, payable at a particular place, should be deemed a general acceptance, unless expressed to be payable there "*only, and not otherwise or elsewhere.*" Since that statute, a bill may, in England, be accepted in three different forms when it is drawn generally on a party, that is: *First*, it may be accepted simply without more. *Secondly*, it may be accepted payable at a particular banker's, which will be the same in effect as against the acceptor; or *thirdly*, it may be accepted payable at a particular banker's "*only, and not otherwise or elsewhere.*" In this latter case, it will be deemed a qualified acceptance; and presentment at the banker's will be a condition precedent to the right of the holder to maintain an action against the acceptor thereon.<sup>4</sup>

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<sup>1</sup>In Byles on Bills, (Sharwood's ed.,) p. 406, it is said: "The acceptor *supra protest*, admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honor he accepts. Thus, where a bill was drawn in favor of a non-existing person or order, but the name of the drawer, and the name of the payee and first indorser were both forged, and the defendant accepted for the honor of the drawer, it was held that the defendant was estopped from disputing that the drawer's signature was genuine, and that the bill was drawn in favor of a non-existing person, was negotiable, and had become payable to bearer." See also Story on Bills, § 262; Redfield and Bigelow's Leading Cases, 88-63.

<sup>2</sup>Story on Bills, § 262.

<sup>3</sup>Rowe vs. Young, 2 Brod. & Bing., 165; 2 Bligh, 391, S. C., overruling the opinion of eight of the twelve Judges who were consulted.

<sup>4</sup>Halstead vs. Skelton, 5 Ad. & El., 86.

In an action against the drawer, or an indorser, if the bill be accepted and payable at a particular place named by the acceptor, it is still necessary to prove presentment there.<sup>1</sup> And so if the bill be *drawn* payable at a particular place, presentment must be made there in order to charge the drawer or indorser.<sup>2</sup> The statute 1 & 2 Geo. IV, does not extend to promissory notes, and therefore if a note be made expressly payable at a particular place, it is necessary in England to present it there for payment in order to charge the maker.<sup>3</sup>

§ 41. In the United States a different view from that expressed by the House of Lords has prevailed; and according to the ruling of the Supreme Court, and of the great current of decisions of the State courts of last resort, the effect and construction of an acceptance would accord with the act of 1 & 2 Geo. IV—that is, the acceptance will be regarded as general in all cases, save when the bill is drawn, or the acceptance expresses that it is payable at a particular banker's "only, and not otherwise or elsewhere."<sup>4</sup> This subject will be more fully discussed when we come to consider the principles governing "presentment for payment."

#### WHAT ACCEPTANCE ADMITS.

§ 42. The acceptor of a bill by the act of acceptance admits the genuineness of the drawer's signature and is thereby estopped from denying it, and, consequently if the bill be in the hands of a *bona fide* holder for value without notice and turn out to be a forgery, he will, nevertheless be liable upon it.<sup>1</sup> But the acceptor is not supposed to know, nor does his acceptance admit the genuineness of the signature of the payee, or of any indorser; and therefore the holder

<sup>1</sup>Gibb vs. Mather, 8 Bing., 214; (21 E. C. L. R.;) 1 m. & sec., 387; 2 C. & J., 254, S. C.; Saul vs. Jones, 28 L. J. Q. B., 37; 1 E. & E., 59, (102 E. C. L. R.,) S. C.

<sup>2</sup>Boydell vs. Harkness, 3 C. B., 168, (54 E. C. L. R.)

<sup>3</sup>Saunderson vs. Bowes, 14 East, 500; Byles on Bills, (Sharswood's ed.,) 344-5.

<sup>4</sup>Wallace vs. McConnell, 13 Peters, 136. Numerous cases are cited in the chapter on Presentment for Payment. Forms of declarations, and an excellent treatise on this subject may be found in 4th Rob. Prac., (N. ed.,) 450-454.

<sup>5</sup>Hoffman & Co. vs. Bank of Milwaukee, 12 Wallace, 193; Hartsman vs. Henshaw, 11 How., 177; Bank U. S. vs. Bank of Georgia, 10 Wheat, 333; Goddard vs. Merchants Bank, 4 Comst., 147; Canal Bank vs. Bank of Albany, 1 Hill, 287; Bank of Commerce vs. Union Bank, 3 Comst., 235; Levy vs. Bank U. S., 1 Binn., 27; Peoria, R. R. Co. vs. Neill, 16 Ill., 269; Ellis vs. Ohio Life, &c., Co., 4 Ohio State, 628; Whitney vs. Bunnell, 8 La., Ann, 429; Wilkinson vs. Luteridge, 1 Str., 648; Cooper vs. LeBlanc, 2 Str., 1051; Leach vs. Buchanan, 4 Esp., 226; Price vs. Neal, 3 Barr. 1351; Smith vs. Chester, 1 Term. R., 654; Bass vs. Clive, 5 M. & Sel., 15; Wilkinson vs. Johnson, 3 Barn. & Cres., 428.

of a bill in order to recover against the acceptor must establish his title by proving that their signatures are genuine.<sup>1</sup>

But acceptance does not admit the signature of the drawer, when he is indorser also, although the bill be payable to the drawer's order, and his signature as drawer is admitted.<sup>2</sup>

It follows from these principles that the acceptor may, on discovering that the payee's signature was forged, recover the amount from the party to whom the payment was made;<sup>3</sup> but if it appears that the payee was never the owner of the bill nor had any interest in it, and the drawee put it in circulation with the forged signature upon it, the acceptor can not recover back the money he has paid from the party to whom he paid it, but may charge it to the drawer, who is estopped from denying the genuineness of the indorsement.<sup>4</sup>

Acceptance also admits the capacity of the party to whom the bill is payable to indorse, and the acceptor can not afterwards plead the party's infancy, coverture, bankruptcy or other disability.<sup>5</sup>

It is also an admission that the bill was drawn upon funds of the drawer in the drawee's hands, and the latter can not deny it.<sup>6</sup>

§ 43. It has been held that the rule that acceptance admits the genuineness of the drawer's signature, does not extend to hold the acceptor liable where the signature is genuine, but there has been a forgery in the body of the instrument, on the ground that the acceptor is bound to be familiar with the drawer's handwriting but not

<sup>1</sup>Merchant's Bank *vs.* McIntyre, 2 Sandf., 431; Goddard *vs.* Merchant's Bank, *Id.*, 247; Coggill *vs.* American Exch. Bank, 1 Comst., 113; Canal Bank *vs.* Bank of Albany, 1 Hill, 287; Gray *vs.* Palmer, 1 Esp., 125; Bosanquet *vs.* Anderson, 6 Esp., 43; Robinson *vs.* Yarrow, 7 Taunt., 455; Smith *vs.* Chester, 1 Term. R., 654; Berman *vs.* Duck, 11 Mees. & Wels., 251.

<sup>2</sup>Robinson *vs.* Yarrow, 7 Taunt., 455; Canal Bank *vs.* Bank of Albany, 1 Hill, 287; Berman *vs.* Duck, 11 M. & W., 251; Williams *vs.* Drexel, 14 Md., 566; Story on Bills, § 489. But see Tucker *vs.* Robarts, 16 Q. B., 560, (71 E. C. L. R.)

<sup>3</sup>Canal Bank *vs.* Bank of Albany, 1 Hill, 287; Talbot *vs.* Bank of Rochester, 1 Hill, 295; Dick *vs.* Leverick, 11 La., 573.

<sup>4</sup>Hortsman *vs.* Henshaw, 11 How., 177; Coggill *vs.* American Bank, 1 Comstock, 113; Meacher *vs.* Fort, 3 Hill, (So. Car.,) 227.

<sup>5</sup>Drayton *vs.* Dale, 2 B. & C., 293; (9 E. C. L. R.;) Brathwaite *vs.* Gardiner, 8 Q. B., 473; (55 E. C. L. R.;) Taylor *vs.* Croker, 4 Esp., 187; Prince *vs.* Branatte, 1 Scott, 312; Smith *vs.* Marsack, 6 C. B., 486; (60 E. C. L. R.;) Byles on Bills, (Sharswood's ed.,) 325.

<sup>6</sup>Hortsman *vs.* Henshaw, 11 How., 177; Raborg *vs.* Peyton, 2 Wheat., 285; Kemble *vs.* Lull, 3 McLean, 272.

with anything else;<sup>1</sup> but there are cases to the contrary<sup>2</sup> which seem to us to be the correct doctrine.

In *Van Duzer vs. Howe*, 21 N. Y., 531, (1860,) defendant wrote his blank acceptance on an agreement with the drawer that he should not draw for more than \$1000, and the latter inserted a larger sum and passed it to the plaintiff,—and the acceptor was held liable.

But if the act of the drawer himself facilitated or gave occasion to the forgery, the drawee may recover the amount overpaid, from him.<sup>3</sup>

§ 44. The acceptance of a bill drawn by an agent admits his handwriting, and also his agency; but it does not admit the agent's power to indorse, though the handwriting is the same as that of the drawer, and though the indorsement preceded the acceptance.<sup>4</sup> But if the drawer is a fictitious person, and the bill is payable to the drawer's order, the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer; and in such case, the indorsee may show as against the acceptor that the signature of the fictitious drawer, and of the first indorser, are in the same handwriting.<sup>5</sup>

If the acceptor of a bill puts it in circulation, he can not dispute its genuineness, or its validity, at the time he issued it;<sup>6</sup> and after once admitting the acceptance to be genuine, he can not afterwards deny it if it turn out a forgery, even if he made the admission believing the acceptance his own.<sup>7</sup>

#### WHEN ACCEPTANCE IRREVOCABLE.

§ 45. When the bill is once accepted and issued, the acceptance is irrevocable. But a drawee, although he has written his acceptance on the bill, may change his mind and cancel it before re-delivery of the bill to the holder. And where a bill was returned by the drawee

<sup>1</sup>*Bank of Commerce vs. Union Bank*, 3 Comst., 230, (1856.) In this case, the amount of the bill was altered from \$105 to \$1005, and the acceptor having paid the latter sum was held entitled to recover it from him to whom he had paid it. See *Story on Bills*, (Bennett's ed.,) § 264.

<sup>2</sup>In *Ward vs. Allen*, 2 Met., (Mass.,) 53, it was held that the fraudulent alteration of the day of payment made before acceptance was no defense to the acceptor against a *bona fide* holder. To same effect is *Langston vs. Lazarus*, 5 Mees. & W., 629.

<sup>3</sup>*Young vs. Grote*, 4 Bing., 253. In this case the space left after the mark "£" was so great that the amount was changed from £52. 2 to £352. 2, and the drawer was required to bear the loss after payment by the drawee.

<sup>4</sup>*Robinson vs. Yarrow*, 7 Taunt., 455; (2 E. C. L. R.;) *Smith vs. Chester*, 1 T. R., 654.

<sup>5</sup>*Cooper vs. Meyer*, 10 Barn & C., 468; *Beeman vs. Duck*, 11 M. & W., 251.

<sup>6</sup>*Leach vs. Buchanan*, 4 Esp., 226.

<sup>7</sup>*Hinton vs. Bank of Columbus*, 9 Porter, (Ala.,) 463.

with an obliterated acceptance, without evidence to account for the obliteration, it was held that there could be no recovery upon it.<sup>1</sup>

But after the acceptance has once been *communicated* to the holder—as by re-delivery of the bill, accepted—it would seem that even with the holder's consent the drawee can not then revoke, because the drawer and indorsers have acquired an interest in the acceptance.<sup>2</sup>

If the drawee retain the bill, nevertheless after once intimating his acceptance, he can not revoke it.<sup>3</sup>

#### EXTINGUISHMENT OF ACCEPTOR'S OBLIGATION.

§ 46. The acceptor's obligation may be extinguished by the express or implied waiver or agreement of the parties, by operation of law, by payment of the bill, or by a release. The acceptor may be discharged by any agreement with the parties to whom he is bound, founded upon a sufficient consideration; and it may be express or implied from circumstances.<sup>4</sup> In the latter case, a clear intention to discharge, or a clear renunciation of all claims against the acceptor, must be established; for mere delay or omission to demand payment from the acceptor, without other circumstances or consideration, will not be sufficient.<sup>5</sup> But where the renunciation is clear and the intention to discharge unquestionable, there, if there be a sufficient consideration, or an act done on the part of the acceptor which might not otherwise have been done, which affects his interests, the acceptor will be discharged.<sup>6</sup> Bankruptcy of the acceptor, or the application of the statute of limitations, are discharges by operation of law; and the execution of a release by the holder of the bill, or the payment of it by the acceptor, terminates his liability upon it. But a release before the maturity of the bill will not discharge an acceptor from liability to pay a holder who took the bill in good faith without notice of the release.<sup>7</sup>

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<sup>1</sup>Cox *vs.* Troy, 5 B. & A., 474, (7 E. C. L. R.) This was previously doubted. Chitty, 347; Thomson on Bills, (Wilson's ed.,) 220; Byles on Bills, (Sharswood's ed.,) 320.

<sup>2</sup>Chitty on Bills, (13 Am. ed.,) 347; Thomson, 221.

<sup>3</sup>Smith *vs.* M'Lure, 5 East, 476.

<sup>4</sup>Harmer *vs.* Steele, 4 W. H. & G., 1; Anderson *vs.* Cleaveland, 13 East, 430; Dugwall *vs.* Dunster, 1 Doug., 247; Chitty, 339; Story, § 266; Byles on Bills, (Sharswood's ed.,) 322; Foster *vs.* Dawber, 6 Exch., 851; Dobson *vs.* Espie, 2 H. & N., 79.

<sup>5</sup>Story on Bills, § 266; Farquharson *vs.* Southey, 1 Mood. & Malk., 14 S. C.; 2 Carr & Payne, 497; Adams *vs.* Gregg, 2 Stark., 531.

<sup>6</sup>Story on Bills, § 266.

<sup>7</sup>Dodd *vs.* Edwards, 2 Car. & P., 602.

§ 47. A cancellation by the holder or by a third party, is evidence of a waiver, and whether the cancellation in the latter case was by the holder's consent or not, is for the jury to determine.<sup>1</sup> If the cancellation is by mistake, it does not operate a discharge;<sup>2</sup> but if the holder, knowing the mistake, causes the bill to be noted for non-acceptance, he is estopped from saying it was accepted.<sup>3</sup>

#### WHEN CONSIDERATION NECESSARY TO ENFORCE ACCEPTOR'S RENUNCIATION.

§ 48. There is no doubt that the doctrine of the text, which is that of Story on Bills, § 236, correctly states the law, as far as it goes; but the law, according to Byles on Bills, (Sharswood's ed.,) p. 324, goes farther, and declares that where there is an *express* renunciation for the *whole* amount, it is binding without consideration. "If the renunciation be not express and for the whole amount, then only," it is said in that work, "there must be a consideration."<sup>4</sup> The reasoning of, and the authority cited by the author, bear out this view.<sup>5</sup>

#### FAILURE OF CONSIDERATION FOR ACCEPTANCE.

§ 49. If the consideration inducing an acceptance afterwards fail, it will nevertheless, be binding to the payee or other holder, if such failure were not occasioned by his fault;<sup>6</sup> and if by the acceptance, the time of payment were extended, or the terms of the bill otherwise varied, the acceptor can not object to the alteration;<sup>7</sup> nor will his obligation be varied by the fact that the bill was accepted after the time of payment had passed.<sup>8</sup>

§ 50. An acceptor being the primary debtor, will not be discharged (as an indorser will be) by taking security from the other parties, or giving them time to pay the bill.<sup>9</sup> But taking a co-extensive securi-

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<sup>1</sup>Sweeting *vs.* Halse, 9 B. & C., 365, (17 E. C. L. R.;) 4 Man. & R., 287.

<sup>2</sup>Wilkinson *vs.* Johnson, 3 B. & C., 428; Raper *vs.* Birkbeck, 15 East, 17; Novelli *vs.* Rossi, 2 B. & Ad., 757.

<sup>3</sup>Sproat *vs.* Mathews, 1 T. R., 182; Bentnick *vs.* Dorrien, 6 East, 199.

<sup>4</sup>Parker *vs.* Leigh, 2 Stark., 228; (3 E. C. L. R.;) Farquhar *vs.* Southey, 2 C. & P., 497; Owen *vs.* Pizey, 11 W. R., C. P., 21.

<sup>5</sup>See Byles on Bills, (Sharswood's ed.,) p. 322-3.

<sup>6</sup>Corbin *vs.* Southgate, 3 Hen. & W., 319.

<sup>7</sup>U. S. *vs.* Bank of Metropolis, 15 Peters, 395; 2 Rob. Prac., (N. ed.,) 151.

<sup>8</sup>Mitford *vs.* Wallicot, 1 Salkeld, 129.

<sup>9</sup>Story on Bills, § 268, and numerous cases cited.

ty from the acceptor himself by specialty will discharge him,<sup>1</sup> unless it recognizes the bill as still existing, in which case it will not.<sup>2</sup> If the holder receive from the acceptor another bill indorsed by the acceptor, as satisfaction or security for the first bill, he discharges him both as acceptor and indorser, by neglect to give him notice of dishonor of the last bill;<sup>3</sup> but not if the last bill was given as collateral security and not indorsed by him.<sup>4</sup>

It was held at one time, that an indorsee, by receiving part payment from the drawer, released the acceptor, on the ground that the acceptor was only a surety for the drawer;<sup>5</sup> but this doctrine has long been overruled and does not apply to accommodation bills more than others.<sup>6</sup>

A banker at whose house a customer accepting a bill makes it payable is liable to an action at the suit of such customer, if he refuse to pay it, having at the time of presentment funds sufficient, and having had those funds a reasonable time so that his employees might know it.

The banker will be authorized to pay any one who holds such a bill and is able to give a valid discharge, but not one who holds under a forged indorsement.

The *second class* requires that the bank should prove that it exercised due care and diligence in selecting a competent and trustworthy notary, agent, or correspondent; certainly, as all agree, the bank must do this much;<sup>7</sup> but these cases exonerates it from further responsibility than exercising such care and diligence in the selection.<sup>8</sup>

<sup>1</sup>Ansell *vs.* Baker, 15 Q. B., 20, (69 E. C. L. R.)

<sup>2</sup>Twopenny *vs.* Young, 3 B. & C., 208, (10 E. C. L. R.)

<sup>3</sup>Bridges *vs.* Berry, 3 Taunt., 130; 1 Pars. N. & B., 329.

<sup>4</sup>Bishop *vs.* Rowe, 3 Maule. & Sel., 362.

<sup>5</sup>Laxton *vs.* Peat, 2 Camp., 185. To same effect as to accommodation bills, see several cases cited in 1 Parsons' N. & B., 326.

<sup>6</sup>Lord Mansfield in *Fentum vs. Pocock*, 5 Taunt., 192, 1 Marsh, 14, which is followed in numerous American cases. See *Lord vs. Ocean Bank*, 20 Penn. St., 384; *Grant vs. Ellicott*, 7 Wend., 227; *Pickering vs. Marsh*, 7 N. H., 192; *Commercial Bank vs. Cunningham*, 24 Pick., 270; *Hansbrough vs. Gray*, 3 Grat., 356; *Bank of M. vs. Walker*, 9 S. & R., 229; *Murray vs. Judah*, 6 Cowen, 484; *Farmers, &c., Bank vs. Rathbone*, 26 Vt., 19; *Clopper vs. Union Bank*, 7 Harris & J., 92; *Yates vs. Donaldson*, 5 Md., 389; *Lambert vs. Sandford*, 2 Blackf., 137; *Chronise vs. Kellogg*, 20 Ill., 11; *Diversy vs. Moor*, 22 *Id.*, 330.

<sup>7</sup>Tiernan *vs.* Commercial Bank, 7 How., Miss., 648; 7 S. & M., 592; 34 Miss., 41.

<sup>8</sup>Baldwin *vs.* Bank of La., 1 La. Am. R., 13; (case of a notary); *Hyde vs. Planters Bank*, 17 La., 566; *Frazier vs. Gas Bank*, 2 Rob., 296



In some of the cases, stress is laid upon the circumstance that a Notary Public is an agent or instrument provided by law, and absolves a bank confiding to his official character from responsibility, which it could not thus transfer to an unofficial agent.<sup>1</sup> But the decisions, as a general rule, do not seem to turn on this consideration.<sup>2</sup> It seems to us, however, a very important one.

JNO. W. DANIEL.

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<sup>1</sup>Bellemire vs. Bank U. S., 4 Whart., 105.

<sup>2</sup>1 Parsons' N. & B., 480.

*Presentment for Acceptance.*

§ 1. It is the right of the holder of a bill to present it for, and insist on its acceptance, even so late as the day before it falls due. If not presented for acceptance until the day it falls due, the right to demand acceptance becomes merged in the right to demand payment. If the bill be presented for acceptance before it falls due, it becomes dishonored if acceptance be refused; and notice must be forthwith given to the parties whom it is intended to charge.<sup>1</sup> And suit may at once be instituted against the drawer, and against the indorsers.<sup>2</sup> This rule of Commercial law is so general and binding that a statute of a State which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the United States Courts. The requisition of a State statute like this would be a violation of the general commercial law, which a State has no power to impose, and which the courts of the United States would be bound to disregard.<sup>3</sup> So also, if the State statute seeks to make the right of recovery, in a suit brought in case of non-acceptance, dependant upon proof of subsequent presentment, protest, and notice for non-payment.<sup>4</sup>

Presentment to the drawee is necessary, even though the drawer has requested him not to accept;<sup>5</sup> but the holder is not bound to present again after refusal to accept and notice given, even though the drawer requests him to do so, and promises that the bill shall be honored.<sup>6</sup>

The only cases in which the holder can charge the drawer without presenting the bill for acceptance arise when the relations between the drawer and drawee are such as to constitute the drawing of the bill a fraud upon the holder.<sup>7</sup> When the bill is presented the ac-

<sup>1</sup>Chitty on Bills, (13th Am. ed.,) 309; Goodall vs. Dolley, 1 T. R., 712. See Chapter on notice; Bank of Washington vs. Triplett, 1 Peters, 25; Townsley vs. Sumrall, 2 Peters, 170; Smith vs. Roach, 7 B. Monroe, 17; Landrum vs. Trowbridge, 2 Metcalfe, 281.

<sup>2</sup>*Ibid.* See also Lucas vs. Laden, 28 Misso., 342; Edwards on Bills, 387; Pilkenton vs. Woods, 10 Indiana, 432; Kinney vs. Heald, 17 Ark., 397.

<sup>3</sup>Watson vs. Tarpley, 18 Howard, 517.

<sup>4</sup>*Ibid.*

<sup>5</sup>Hill vs. Heap, Dow & R., N. P., 57. See 1 Parsons, N. & B., 338.

<sup>6</sup>Hickliff vs. Hardey, 7 Taunt., 312.

<sup>7</sup>Smith's Mercantile Law, (Holcumbe & Gholsen's ed.,) 304; 1 Peters, 25.

ceptance must be according to its tenor to pay in money. If it be to pay by another bill, it is no acceptance, and the bill should be protested.<sup>1</sup>

§ 2. Before acceptance the drawee is under no liability to accept, unless he has specially contracted to do so, and the holder can not sue him, even though he have funds of the drawer in his hands.<sup>2</sup> But an acceptance operates as a full legal assignment of the amount to the holder, and the acceptor is bound to pay it. It has been much debated whether or not a bill before acceptance operates as an assignment when drawn upon funds of the amount it calls for; and it seems to be settled by the authorities that if drawn for the whole amount it operates as an equitable assignment, which will take precedence of any subsequent lien or charge upon them;<sup>3</sup> and that after notice to the drawee will bind him.<sup>4</sup> And it has been so held of a draft non-negotiable.<sup>5</sup> But when the bill is for only a part of the drawer's funds, it is said that it does not operate as an assignment against the drawee, unless he accepts, for the reason that the creditor can not be permitted without the debtor's consent to split up one cause of action into several.<sup>6</sup> Where the draft is not negotiable, the weight of authority is to this effect.<sup>7</sup>

#### WHAT BILLS NEED NOT BE—AND WHAT BILLS MUST BE PRESENTED FOR ACCEPTANCE.

§ 3. Bills payable on demand, (which are immediately payable on presentment,) or payable at a certain number of days after date, or after any other certain event, or payable on a day certain, need not be presented for acceptance at all, but only for payment.<sup>8</sup> But it is usual and best when the bill is payable at a future day, to present it for acceptance, in order to ascertain whether it will certainly be hon-

<sup>1</sup>Russell vs. Phillips, 14 Q. B., 891.

<sup>2</sup>Mandeville vs. Welch, 5 Wheat, 277; Schimmelpennich vs. Bayard, 1 Peters, 264; Tiernan vs. Jackson, 5 Peters, 580. The case of Corser vs. Craig, 1 Wash. C. C. R., 424, has been overruled. Luff vs. Pope, 5 Hill, 413; 7 *Id.*, 577; N. Y. and Va. S. Bank vs. Gibson, 5 Duer, 574; Harris vs. Clark, 3 Comst., 93.

<sup>3</sup>Mandeville vs. Welch, 5 Wheat, 277; Anderson vs. DeSoer, 6 Grat., 364; Gibson vs. Cooke, 20 Pick., 15. <sup>4</sup>*Id.*

<sup>5</sup>Cutts vs. Perkins, 12 Mass., 209; Morton vs. Naylor, 1 Hill, 583.

<sup>6</sup>Story, J., in Mandeville vs. Welch, 5 Wheat, 277; Gibson vs. Cooke, 20 Pick., 15.

<sup>7</sup>1 Pars., N. & B., 334.

<sup>8</sup>Bank of Washington vs. Triplett, 1 Peters, 25; Townsley vs. Sumrall, 2 Peters, 170; Allen vs. Suydam, 20 Wend., 321; Bachellor vs. Priest, 12 Pick, 399; Bank of Bennington vs. Raymond, 12 Vt., 401; Smith vs. Roach, 7 B. Monroe, 17; Carmichael vs. Bank of Penn., 4 Howard Miss., 567; Glasgow vs. Copeland, 8 Misso., 268; Orr vs. Maginnis, 7 East, 362; Dunn vs. O'Keefe, 5 Maule & S., 282.

ored, and to procure the assurance of the acceptor's liability.<sup>1</sup> And in such cases, if acceptance be refused, the holder must make protest, and give notice in the same manner as if the bill were payable at so many days after sight.<sup>2</sup>

Bills payable at sight, (when such bills are entitled to grace,) or at so many days after sight, or after demand, or after any other event not absolutely fixed, must be presented to the drawee for acceptance in order to fix the period of maturity.<sup>3</sup> When the words "acceptance waived," are embodied in a bill, the ordinary proceedings in acceptance are dispensed with, and merged into those of payment or non-payment.<sup>4</sup>

#### BY AND TO WHOM PRESENTMENT FOR ACCEPTANCE MADE.

§ 4. The bill must be presented by the holder, or his authorized agent; and to the drawee or his authorized agent. The party in possession of the bill is presumed to be the holder, and to have the right to make presentment for acceptance or payment.<sup>5</sup> The drawee may accept without risk, and if he refuse the protest will inure to the benefit of the rightful holder.<sup>6</sup> If the drawee can not be found, and any person has been indicated to be resorted to in case of need, (*au besoin*,) the bill should be presented to that person.<sup>7</sup>

If the bill be drawn upon two persons not partners, it seems that it must be presented to both, if not paid by the first;<sup>8</sup> but this has been doubted, for the reason that the holder would not be bound to take the single acceptance of the other—and if he did, it would be at his own risk, if the bill were not protested.<sup>9</sup>

<sup>1</sup>U. S. *vs.* Barker, 4 Wash. C. C. R., 464.

<sup>2</sup>Glasgow *vs.* Copeland, 8 Miao., 268; Allen *vs.* Suydam, 20 Wend., 321; U. S. *vs.* Barker, 4 Wash. C. C. R., 464; Landrum *vs.* Trowbridge, 2 Metc., 281.

Philpott *vs.* Bryant, 3 Car. & P., 244, in which case Park, J., said: "I should destroy half the trade of the City of London, if I were to hold that bills made payable so many days after date must be presented for acceptance."

<sup>3</sup>Aymar *vs.* Beers, 7 Cowen, 705; Robinson *vs.* Ames, 20 Johns., 146; Wallace *vs.* Agry, 4 Mason, 336, 5 Mason, 118; Mitchell *vs.* Degrand, 1 Mason, 176; Story on Bills, § 228. Whether or not bills payable at sight are entitled to grace, is a question about which authorities differ, though preponderating in favor of the allowance of grace. See on this subject, the chapter on Presentment for Payment.

<sup>4</sup>Webb *vs.* Mears, 9 Wright, 222.

<sup>5</sup>Bank of Utica *vs.* Smith, 18 Johns., 230; Freeman *vs.* Boynton, 7 Mass., 483; Agnew *vs.* Bank of Gettysburg, 2 Har. & Gill, 478.

<sup>6</sup>Chitty on Bills, (13th Am. ed.,) 311. <sup>7</sup>Story on Bills, § 229.

<sup>8</sup>Welles *vs.* Green, 5 Hill, 232; Story on Bills, § 229.

<sup>9</sup>Story on Bills, § 229, note 9.

But if the bill be drawn upon a firm, presentment to any party is sufficient.<sup>1</sup>

§ 5. The holder must be careful, when he does not find the drawee in person, to assure himself that the party to whom he presents the bill for acceptance, is his authorized agent. And though in the case of a presentment for payment it may suffice to demand payment at the residence of the acceptor, yet in case of a presentment for acceptance, the holder must endeavor to see the drawee or his authorized agent, personally. And therefore, where in an action against the drawee on a refusal to accept, it appeared that the witness had carried the bill to a place which was described to him as the drawee's house, and that he offered it to a person in a tan yard, who refused to accept it; and the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so, it was held that the evidence of presentment to the drawee for acceptance, was insufficient.<sup>2</sup>

§ 6. There is no doubt that a clerk found at the drawee's counting-room, is a competent party for the bill to be presented to, and to refuse acceptance of it; and it seems that it is not necessary to show that such clerk was the clerk of the drawee authorized to accept or refuse acceptance of bills; but parol evidence is admissible to prove that the clerk was authorized to refuse acceptance.<sup>3</sup>

#### PLACE OF PRESENTMENT FOR ACCEPTANCE.

§ 7. It was at one time a question much litigated in England, whether, if a bill payable generally—that is, without specification of a place of payment—was accepted payable at a particular place, such an acceptance was a qualified one. It was decided in the House of Lords, (contrary, however, to the opinion of eight of the twelve judges to whom the question was referred,) that such an acceptance was a qualified one, and that a demand at the particular place named was a condition precedent to a recovery against the acceptor, as well as against the drawer and indorser.<sup>4</sup> This decision led to the passage of the Statute of 1 & 2 Geo. IV, c. 78, (called Sergeant Onslow's Act,) in which it was recited that the practice and understanding of merchants had been different; and enacted that an acceptance payable at a particular place without further expression, should not be deemed

<sup>1</sup>Greatlake *vs.* Brown, 2 Cranch C. C., 541; Story, § 229; 1 Pars. N. & B., 135.

<sup>2</sup>Cheek *vs.* Roper, 5 Esp., 175.

<sup>3</sup>Nelson *vs.* Fotterall, 7 Leigh, 180; Stainback *vs.* Bank of Virginia, 11 Grat., 260.

<sup>4</sup>Rowe *vs.* Young, 2 Brod. & B., 165; 2 Bligh, 391.

a conditional acceptance; but if it were payable at a specified place "*only, and not otherwise, or elsewhere,*" it should be deemed conditional.

In many of the States the English Statute has been substantially enacted; and the courts, with few exceptions, have independently of statute, followed the judgment of the eight judges against the House of Lords. Therefore, by the American Law, it is settled that demand of payment at the place specified need not be averred by the plaintiff; but if the acceptor was at the place at the time specified, and ready to pay the money, it was a matter of defense to be pleaded on his part; which defense, however, is no bar to the action, but goes only in reduction of damages, and in prevention of costs.<sup>1</sup> This subject will be more fully discussed when we come to consider presentment for payment.

But at any rate, the presentment of the bill or note for acceptance should be at the place of the domicil of the drawee, whether it be payable generally, or at a particular place—the place of payment being immaterial until after acceptance.<sup>2</sup> If the drawee has removed his residence from the place to which it is addressed—or really resided at a different place—the bill should be presented at his new, or real, place of domicil, if the holder can ascertain it by diligent inquiries.<sup>3</sup> If by such inquiries the drawee's place of domicil can not be ascertained, or if he has absconded, the bill may be treated as dishonored.<sup>4</sup>

§ 8. If the drawee has his dwelling house in one part of the town, or city, and his place of business at another, presentment for acceptance may be made at either place; and if the drawee resides in one town, and has his place of business at another, the holder may present the bill at either.<sup>5</sup>

§ 9. Presentment for acceptance should, in all cases, be made during the usual hours of business.<sup>6</sup> But presentment to a tradesman need not be during banking hours—eight o'clock in the evening would suffice.<sup>7</sup> And it matters not at what hour the presentment be made, if an answer be given by an authorized person.<sup>8</sup> But

<sup>1</sup>See 1 Pars. N. & B., 305-311; Story on Bills, §§ 355-357; Byles on Bills, (Sharswood's ed.,) 318-319, and 341-346; Edwards on Bills, 426, 428; Bayley, 115. In Indiana, the House of Lords has been followed: See Presentment for Payment.

<sup>2</sup>Chitty on Bills, (13th Am. ed.,) 316.

<sup>3</sup>Anderson vs. Drake, 14 Johns., 114; Freeman vs. Boynton, 7 Mass., 483; Bateman vs. Joseph, 12 East, 433.

<sup>4</sup>*Id.*; Chitty, 316.

<sup>5</sup>Story on Bills, § 236.

<sup>6</sup>Elford vs. Teed, 1 Maules & S., 28; see *post*, Presentment for Payment.

<sup>7</sup>Chitty on Bills, (13th Am. ed.) 313.

<sup>8</sup>Chitty, 316.

it is a mere nullity if made at an unseasonable hour—after bedtime, or business hours—if no such answer be given.<sup>1</sup> If there is a known custom or usage in a town or city, which regulates business hours, that should govern in determining the proper hour for presentment at the drawee's place of business.<sup>2</sup>

#### HOW PRESENTMENT FOR ACCEPTANCE IS MADE.

§ 10. The holder of a bill should have it in possession and should present it actually to the drawee for his signature as acceptor;<sup>3</sup> but it is not absolutely necessary to show him the bill, if when applied to for acceptance he is enabled by seeing it or otherwise to give an intelligent answer.<sup>4</sup> If the holder does not produce the bill the drawee may require him to do so, and decline accepting save in the proper form by writing his name on its face; and then unless the holder produces it the drawee can not be charged with the penalties of non-acceptance, but if the drawee makes no such requirement and does what is equivalent to acceptance he can not afterwards refuse to be held on the ground that he did not see the bill.<sup>5</sup>

If the holder leave the bill with the acceptor, and by his negligence enable a third party to get possession of it, he can not hold the acceptor liable in an action of trover.<sup>6</sup>

Either one of a set of bills may be presented and accepted; and the indorsement of one of a set carries all, and an indorsee may maintain trover for the rest.<sup>7</sup>

#### WITHIN WHAT TIME MUST THE BILL BE PRESENTED FOR ACCEPTANCE?

§ 11. If the bill be drawn payable at a certain time after date, it must be presented before or at time of maturity.<sup>8</sup> If payable at sight, or at a certain time after sight, or on demand, the only rule which can be laid down is that it must be presented within a reasonable time,<sup>9</sup> unless there be some well established usage of trade which

<sup>1</sup>Story on Bills, § 237.

<sup>2</sup>Story on Bills, §§ 236, 349; Story on Notes, § 135; Bayley on Bills, c. 7, § 1.

<sup>3</sup>1 Parsons, N. & B., 348.

<sup>4</sup>Fisher *vs.* Beckwith, 19 Vt., 31; Carmichael *vs.* Bank of Penn., 4 Howard, (Miss.,) 567.

<sup>5</sup>Fall River Union Bank *vs.* Willard, 5 Met., 216.

<sup>6</sup>Morrison *vs.* Buchanan, 6 Car. and P., 18.

<sup>7</sup>Dennes & Co. *vs.* Church, 13 Peters, 205; Walsh *vs.* Blatchley, 6 Wisc., 422; Pereira *vs.* Jepp., 11 B. & C., 449; Edwards on Bills, 304 and 162.

<sup>8</sup>Townsley *vs.* Sumrall, 2 Peters, 178; Goupy *vs.* Harden, 7 Taunt., 159; Bacheller *vs.* Priest, 12 Pick., 399.

<sup>9</sup>Wallace *vs.* Agry, 4 Mason, 336; Mullick *vs.* Radakissen, 9 Moore, P. C., 66; Bridgeport Bank *vs.* Dyer, 19 Conn., 136.



fixes a definite time for such presentment, in which case such usage would control.<sup>1</sup> If the bill be not presented within a reasonable time the drawer is discharged, although all the parties continue solvent and there is no damage caused by the delay.<sup>2</sup>

GENERAL RULE AS TO REASONABLE TIME—WHEN QUESTION OF LAW AND WHEN QUESTION OF FACT.

§ 12. "What reasonable time is," said Story J., in *Wallace vs. Agry*, 4 Mason, 336, "depends upon the circumstances of each particular case, and no definite rule has been as yet laid down, or indeed can be laid down to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, I take it, is the doctrine of the authorities."<sup>3</sup> A more accurate statement of the rule, as we conceive, is that of Bigelow, J., in *Prescott Bank vs. Coterly*, 7 Gray, 217.

"Ordinarily," says he, "the question whether a presentment was within a reasonable time, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not."<sup>4</sup>

"In this State," (New York,) says Edward's on Bills, 391, "the question is considered one of law to be decided by the court," quoting *Aymar vs. Beers*, 7 Cowen, 705: The cases cited in *Aymar vs. Beers* in support of this doctrine related to notice. The principle of the text seems to us far more reasonable.

<sup>1</sup>Mellish vs. Rawdon, 9 Bing. R., 416.

<sup>2</sup>Mullick vs. Radakissen, 9 Moore, P. C., 66; 28 E. L. & Eq., 86; Carter vs. Flower, 16 M. & W., 743.

<sup>3</sup>Fry vs. Hill, 7 Taunt., 397; Goupy vs. Harden, 7 Taunt., 159; Muilman vs. D'Equine, 2 H. Bl., 565; Fernandez vs. Lewis, 1 McCord, 322.

<sup>4</sup>The rule as stated by Professor Parsons, 1 Vol., N. & B., 340, is substantially this: He says, "Where the facts are few and simple, and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine." See also Shute vs. Robins, 3 Car. & P., 80 E. C. L. R.; Straker vs. Graham, 4 M. & W., 721; Mullick vs. Radakissen, 28 E. L. & Eq. 86.

## DUE DILIGENCE MUST BE EXERCISED.

§ 13. It is not necessary for the holder to take the first opportunity to present for acceptance,<sup>1</sup> though to avoid question in case of loss it is advisable to do so—due diligence—that is presentment within a reasonable time, is all that is necessary. “The distinction is,” it was said in *Goupy vs. Harden*, 7 Taunt., 159, by Gibbs, C. J., “between bills payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former the holder is bound to use all due diligence, and present the bill at maturity; but in the latter case he has a right to put the bill into circulation before he presents it, and then of course it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and interest.”

## REASONABLE TIME WHEN THE BILL HAS PASSED INTO CIRCULATION.

§ 14. A larger latitude is allowed for presentment for acceptance when the holder transfers the bill and it passes into circulation. In such cases a long delay, say of a year or more, would not be negligence; but if the transferer came again in possession of the bill, a more stringent rule would be applied to him than to transferees.<sup>2</sup> But if the holder retains possession of the bill for an unreasonable time, and thus locks it up from circulation, he makes it his own, and will have no remedy against antecedent parties from or through whom he derived title.<sup>3</sup>

§ 15. As illustrations, where *A*, of Calcutta, drew a bill, payable sixty days after sight, on *B*, of Hong Kong, and indorsed it to *C*, of Calcutta, and the latter finding bills on China unsaleable without the prospect of improvement, kept the bill *five months*, and then indorsed it to *C*, who forwarded it for acceptance, which was refused—it was held that the drawer was discharged by the unreasonable delay, although the parties were solvent, and he had suffered no damage.<sup>4</sup> In *Fernandez vs. Lewis*, 1 McCord, 322, a bill drawn in Charleston, South Carolina, on New York, at three days, was not presented for *two and a half months*. The holder lived several days in the same house with the drawee; and it was held that the drawer was dis-

<sup>1</sup>*Muilman vs. D'Equine*, 2 H. Bl., 565; *Prescott Bank vs. Coverly*, 7 Gray, 217.

<sup>2</sup>*Muilman vs. D'Equine*, 2 H. Bl., 565; Byles, (Sharswood's ed.,) 141.

<sup>3</sup>*Bayley on Bills*, p. 227; *Chitty*, p. 301; *Story on Bills*, § 231; *Robinson vs. Ames*, 20 Johns., 146; *Gowan vs. Jackson*, *Id.*, 176; *Fry vs. Hill*, 7 Taunt., 397.

<sup>4</sup>*Mullick vs. Radakissen*, 28 Eng. L. & Eq. R., 86; 9 Moore, P. C. 66.

charged by the delay. In another case, *one month's* delay was held too much, the distance between the residences of the drawer and the drawee being only eighteen miles, with communication three times a week between them.<sup>1</sup>

In *Bolton vs. Harrod*, 9 Mart., (La.) 326, a bill drawn in New Orleans on Liverpool, at thirty days, was sent by way of New York, and a delay of *two and a half months* in presentment was held no laches; and it has been frequently held that, while a holder would hardly be warranted in sending the bill to a remote place wholly out of the course of trade, yet he may put it in circulation, or send it to any other place within reasonable mercantile relations for remittance or sale. A bill drawn in Havana on London may be forwarded by way of the United States—one drawn in London by way of Paris and Genoa; and one drawn in New Orleans on Liverpool, by way of New York.<sup>2</sup>

Bills drawn in London on Calcutta at ninety days, were circulated *seventy-eight days in England*, and the delay was held no laches;<sup>3</sup> and like decisions were rendered where a bill was drawn in London on Lisbon at thirty days, circulated through Paris and Genoa, and presented after a delay of *three months and ten days*;<sup>4</sup> where a bill was drawn in Plymouth on London at twenty days, sight, and was not

<sup>1</sup>Dumont vs. Pope, 7 Blackf., 367.

<sup>2</sup>In *Wallace vs. Agry*, 4 Mason, 336, Story, J., said: "It has been said that the plaintiff was bound to send it (the bill) directly from Havana to England by some regular conveyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party who receives a negotiable bill payable after sight has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this, as on other occasions. The holder of such a bill is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby, in the presentment for acceptance; and thus to fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that, by the course of trade, many bills of exchange drawn in Havana on England are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule to hold that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to such extent. In my judgment, the remittance of the bill to Boston for sale was not a discharge of the defendants."

<sup>3</sup>Muilman vs. D'Equino, 2 H Bl., 565.

<sup>4</sup>Goupy vs. Harden, 7 Taunt., 397.

presented for *nine days*;<sup>1</sup> where one was drawn in Windsor on London and was not presented for *four days*, (Sunday intervening;<sup>2</sup>) where a bill was drawn at sixty days at Augusta, Georgia, on New York, and was put in circulation and not presented for *two months and a half*;<sup>3</sup> and where a bill drawn in Antigua on London at ninety, was circulated for *six months*—a packet leaving Antigua for London once a month.<sup>4</sup>

§ 16. Where a sight draft on New York was indorsed to the plaintiff in Wisconsin, and was not mailed to New York for presentment for fourteen days, it was held *prima facie* evidence of laches, but might be rebutted.<sup>5</sup> But presentment in Boston on Wednesday during banking hours, of a bill at sight, indorsed to the holder in Lowell after banking hours the previous Saturday, and forwarded by the holder to Boston on Tuesday, was held sufficient to charge an indorser.<sup>6</sup>

#### EFFECT OF FALLING OR RISING OF RATE OF EXCHANGE.

§ 17. The falling or rising of the rate of exchange in the place of residence of the drawee, should be taken into consideration in determining whether or not there was unreasonable delay; and if exchange were steady, without prospect of change, or were rising, a shorter and less extended period of time would be thought reasonable, while if the exchange fell immediately after the sale of the bill, the jury might then think a more extended period might fairly and reasonably be allowed the holder, in order to enable him *bona fide* to endeavor to make a fair profit, or at all events to endeavor to secure himself from loss.<sup>7</sup>

<sup>1</sup>Shute vs. Robins, Moody & M., 133; 3 Car. & P., 80.

<sup>2</sup>Fry vs. Hill, 7 Taunt., 397.

<sup>3</sup>Robinson vs. Ames, 20 Johns., 146; Edwards on Bills, 389.

<sup>4</sup>Gowan vs. Jackson, 20 Johns., 176.

<sup>5</sup>Walsh vs. Dart, 23 Wisc., 334.

<sup>6</sup>Prescott Bank vs. Caverly, 7 Gray, 217.

<sup>7</sup>Mellish vs. Rawden, 9 Bing., 416; 2 Moore & S., 570; Wallace vs. Agry, 4 Mason, 336. In Mullick vs. Radakissen, 28 Eng. L. & Eq., 86, the bill was drawn in Calcutta on Hong Kong, at sixty days, and the indorsee kept the bill five months. Held, no laches. Parke, B., saying: The court "thought that the evidence proved that, for the whole of the time, a period of more than five months, bills on China were altogether unsalable in Calcutta; that such was the permanent and regular state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion that the evidence fully justified this conclusion from it, and that the court, deciding on facts, as a jury, were perfectly right."

## FACILITY OF COMMUNICATION BETWEEN THE PLACES.

§ 18. The facility of communication between the places should be considered, in determining the question of *laches*, when the party who presents the bill has had it in his possession for some length of time.<sup>1</sup>

## THE QUESTION NOT AFFECTED BY SOLVENCY OF THE DRAWER.

§ 19. The continued solvency of the drawer, and the want of proof of actual loss by *laches*, are not circumstances to be considered in answer to the objection of delay in presentment; the simple question being, whether or not the delay was reasonable under the circumstances of the case.<sup>2</sup>

## AGENT'S DUTY IN PRESENTING FOR ACCEPTANCE.

§ 20. It is said that there are two exceptions to the general rule that it is not necessary to present a bill payable at a time certain for acceptance, before it becomes due—the first arising when there is an express direction to the payee or holder of the bill, and the second, when the bill is put in the hands of an agent for negotiation. In *Allen vs. Suydam*, 17 Wend., 368, (confirmed in 20 Wend., 321,) it

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<sup>1</sup>*Shute vs. Robins*, Moody & M., 133; 3 Car. & P., 80; *Straker vs. Graham*, 4 M. & W., 721; *Mullick vs. Radakissen*, 9 Moore, P. C., 66; 28 Eng. L. & Eq., 86; *Dumont vs. Pope*, 7 Blackf., 367. In *Straker vs. Graham*, 4 M. & W., 721, the bill was drawn in Carbonear, Newfoundland, on Poole, England, at ninety days, and was not presented until three months after date. Carbonear is twenty miles from, and was in daily communication with St. Johns, from which the mails were sent to England three times a week. The average length of the voyage was eighteen days. No excuse being shown for de'ay, it was held that the bill was not presented in a reasonable time.

<sup>2</sup>In *Mullick vs. Radakissen*, 9 Moore, P. C., 46, 28 Eng. L. & Eq., 86, the Court said: "It remains to consider only one point which was insisted on in the Court below, and also argued at the bar before us; namely: that as the drawers remained perfectly solvent from the date of the bill to the present time, the rule as to presenting in a reasonable time did not apply, and that there was no *laches* which would constitute a defense by the drawers unless they had incurred a loss by that *laches*. The Court below decided that the solvency of the drawers, and the want of actual loss by *laches*, constituted no answer to the objection of *laches*. We think they were right. \* \* \* \* \* This point was fully considered in the case of *Carter vs. Flower*, 16 M. & W., 743, and we believe admits of no doubt; and we agree with the Court below, that the continued solvency of the drawers does not prevent the application of the rule that the bill must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented."

was held that an agent who received a bill, payable after date, for collection, and which had not been accepted, was bound to present it without unreasonable delay; and having delayed for seventeen days to do so, he was liable to his principal for all damages he might have sustained by his delay. This is a leading case, and was decided upon thorough argument and consideration. It is, however, criticised, and dissented from by Professor Parsons,<sup>1</sup> on the ground that as it would not be negligence in the principal to delay, it would be unjust to consider it such in the agent, and the latter should not be held responsible without some express or implied instruction to present immediately. But we are inclined to coincide with the case cited;<sup>2</sup> which is supported by the analogy of the Scotch law,<sup>3</sup> and by English authority.<sup>4</sup>

§ 21. In case a debt is lost by the negligence of an agent to present the bill for acceptance or payment, the measure of damages is *prima facie* the amount of the bill; but evidence is admissible to reduce the amount to a nominal sum.<sup>5</sup>

§ 22. The bank must certainly prove that it selected a competent and trustworthy agent; and if loss results from the circumstance that one of a different character was employed, there is no doubt that the bank would be bound to make it good to the holder.<sup>6</sup>

#### DUTY OF BANK IN WHICH NEGOTIABLE PAPER IS DEPOSITED FOR COLLECTION.

§ 23. It is the duty of a bank, in which negotiable paper is deposited for collection, to take whatever steps may be necessary to the prompt collection of the amount due the holder: to present the in-

<sup>1</sup>Parsons' N. & B., 346-7.

<sup>2</sup>See Redfield and Bigelow's Leading Cases, pages 34 and 35.

<sup>3</sup>Thomson on Bills (Wilson's ed.), 277.

<sup>4</sup>Vanwurt vs. Woolley, 3 B. & C., 439; 5 Dow. & R., 374; Chitty on Bills (13 Am. ed.), 311; Byles (Sharswood's ed.), 299.

<sup>5</sup>Allen vs. Suydam, 20 Wend., 321; Van Wort vs. Woolley, 5 Dowl. & Ry., 374.

<sup>6</sup>Tiernan vs. Commercial Bank, 7 How., Miss., 648; 7 S. & M., 592; 34 Miss., 41. Where an action was commenced against the collecting bank, and the plaintiff proved that the notary was of dissipated habits, the court instructed the jury that if the notary was not a competent and faithful person, by reason of his intemperate habits, when the note was delivered to him, then the bank was liable. Agricultural Bank vs. Commercial Bank, 7 S. & M., 592. But when it appears that the notary, although dissipated, is a very competent officer when sober, and, in fact, the fittest person in the place to do the business, the bank will not be held liable, unless it is made to appear that the loss was the necessary consequence of the notary's bad habits. *Ibid.*

strument for acceptance, or payment, as the case may be. And if it be not duly accepted, or paid, it must take all necessary steps to fix the liability of drawer, or indorsers, as the case may be. So far, there is no conflict of authority, for such duties as these are plain, and everywhere recognized by commercial usage and by legal tribunals.

§ 24. But what is the measure of the duty and responsibility of the collecting bank on taking the steps necessary to collection, or fixing the parties' liabilities, is a question of difficulty. How far is it liable for the neglect, or default, of the notary which it employs to perform notarial functions? or of the sub-agent or corresponding bank to which it may confide the paper? There are several classes of cases in which the courts have pronounced different views of these questions.

The *first class* maintains the absolute liability of the bank for any negligence or default of the notary, agent, or correspondent, regarding it, by the act of undertaking the collection, as obligatory itself to see that every proper measure is taken, and not inquiring whether it has itself been guilty of any negligence or not, or whether the parties reside at the place of its location or not.<sup>1</sup>

The *second class* of cases requires the bank to prove that it exercised due care and diligence in selecting a competent and trustworthy notary, agent, or correspondent. This much is perfectly agreed, but these cases hold it sufficient, and exonerate the bank from all liability beyond making such a selection.

There is implied authority, in the deposit for collection, to employ a sub-agent, as they hold, and such sub-agent is really the agent of the holder, and not of the bank, which is only bound to act judiciously in selecting him.<sup>2</sup>

In a number of the cases stress is laid upon the circumstance that the agent employed was a notary public, and regarding him as an agent or instrument provided by law, consider the bank as authorized to place a confidence in his official character which it could not, save on its own responsibility, repose in an unofficial employee.<sup>3</sup>

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<sup>1</sup>Allen vs. Merchants Bank, 22 Wend., 215, overruling S. C., 15 Wend., 482. This is the settled rule in New York. See Edwards on Bills, 475-6.

<sup>2</sup>Stacy vs. Dane County Bank, 12 Wisc., 629; Bellemire vs. Bank U. S., 4 Whart. 105; Baldwin vs. Bank of La., 1 La. Ann. R., 13; Hyde vs. Planters Bank, 17 La., 566; Frazier vs. Gas Bank, 2 Rob., 296; Warren Bank vs. Suffolk Bank, 10 Cush., 552. See also, Jackson vs. Union Bank, 6 Har. & J., 146.

<sup>3</sup>Baldwin vs. Bank of La., 1 La. Ann. R., 13; Bellemire vs. Bank U. S., 4 Whart. 105; Bank of Mobile vs. Haggins, 3 Ala., 206; Tiernan vs. Commercial Bank, 7 How. Miss., 618; Agricultural Bank vs. Commercial Bank, 7 S. & M., 592.



A *third class* of cases holds that where a bank receives a bill or note for collection against a drawer, or maker, *resident at the place of the bank*, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect. But they consider that where such an instrument is received for collection at a point distant from the location of the bank, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions.<sup>1</sup>

The cases which hold the bank absolutely liable for any laches or negligence, whereby the holder of the paper suffers loss, commend themselves to our approbation. Any other rule opens the door to carelessness in the conduct of banking business, which should be conducted with every safeguard to the customer who entrusts his interests to the keeping of such agents. If they have to deal with distant and unknown parties, they should decline undertaking the collection or handling of the paper; and if they assume it, they should do so for sufficient compensation, and be held responsible. If unwilling to take charge of the collection under this implied understanding, they should insist on a special contract, or refuse it.

#### EFFECT OF WAR, SICKNESS, INEVITABLE ACCIDENT, AND OTHER REASONABLE CAUSES OF DELAY.

§ 25. Any reasonable cause, such as sickness,<sup>2</sup> inevitable accident, or intervention of war,<sup>3</sup> or other circumstance beyond the holder's control, will excuse delay in presentment for acceptance. But these and other circumstances, excusing delay or failure to make due presentment for acceptance, will be hereafter considered in connection with the consideration of the excuses which may be made for like delay or failure in respect to presentment for payment, and giving notice of dishonor.

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<sup>1</sup>*Fabens vs. Mercantile Bank*, 23 Pick., 330, there being no agreement for compensation for collection; but the general custom of the bank to make temporary use of the money collected, was considered sufficient in *Thompson vs. Bank of the State*, 3 Hill, (So. Car.,) 77. *Edna Insurance Co. vs. Alton City Bank*, 25 Illinois, 243; *East Haddam Bank vs. Scovil*, 12 Conn., 303.

<sup>2</sup>In *Aymar vs. Beers*, 7 Cowen, 705, the defendant sought to excuse delay in presenting for acceptance on account of the payee's sickness. The court below rejected the evidence; but the court above held that sickness was an excuse, and ordered a new trial.

<sup>3</sup>*U. S. vs. Barker*, 1 Paine, C. C., 156. In this case, a bill drawn in the United States on Liverpool was presented three months from date. War existing between the two countries, it was held no laches.

§ 26. Whenever it is incumbent on the holder to present the bill, if he fails to do so, he will lose not only his remedy on the bill, but also on the consideration or debt, in respect of which it was given or transferred.<sup>1</sup>

JNO. W. DANIEL.

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<sup>1</sup>Adams vs. Darby, 28 Misso., 182.

*Digest of English Law Reports for May and June, 1872.*

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[EQUITY SERIES.]

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CONVERSION.

By an indenture, dated in March, 1862, lands were conveyed by two tenants in common, *L.* and *S.*, to a trustee upon trust to sell and to hold the proceeds in trust for *L.* and *S.* in equal shares, and as to the share of *S.* for her separate use. The indenture contained powers of exchange and partition; and it was declared that until the sale the trustee should hold the lands upon trust as to one moiety for *L.* and as to the other moiety for *S.* for her separate use.

By articles of agreement made in the following month, it was agreed that the trustee should allot the lands described in the first schedule to *L.*, and those described in the second schedule to *S.*, and should stand possessed of the allotments upon the same trusts as were by the deed of March, 1862, declared of the respective moities, but without prejudice to the powers vested in the trustee by that indenture.

*S.* was a married woman, and her husband was an alien. By her will, made in August, 1862, she gave all her landed property situated at *E.*, being her allotment under the articles of agreement, which still remained unsold, to her husband for life, with remainder over:—

*Held*, (reversing the decision of *Stuart*, V. C.,) that the trust for sale had been put an end to by the agreement of April, 1865; and that the property passed as real estate under the will of *S.*:

*Held*, also, that if the trust for sale had been still subsisting, *S.* had elected to take the property as real estate.

The *Naturalization Act*, 1870, (33 Vict., c. 14,) s. 2, is not retrospective.

The Court of Chancery will enforce in favor of the Crown a trust of land for an alien created prior to the Act.

*Barrow* vs. *Wadkin*, (24 Beav., 1,) approved of. *Sharp* vs. *St. Sauveur*, L. C., 343, vol. vii.

CONSTRUCTION.—See WILL.

CY-PRES.—See WILL.

DEED OF GIFT.—See VOLUNTARY SETTLEMENT.

DISTRIBUTION.—See ISSUE THEN LIVING.

ENDOWMENT.—See WILL.

ESTATE BY IMPLICATION.—See WILL.

ESTATE TAIL.—See ISSUE THEN LIVING.

EVIDENCE.—See RAILWAY; STATEMENT TO DISCREDIT WITNESSES.

### EXTINCTION OF POWER.

In 1825 *D.* mortgaged an estate to *I.* in fee (subject, among other incumbrances, to an existing mortgage for £3,000) to secure £27,000 payable at the end of twelve months, with interest in the meantime. The mortgage deed contained a power of sale, providing that if default should be made in payment of the interest, or any part of it, for a month after any of the days appointed for payment, or in payment of the principal on the appointed day, then at any time thereafter, though no advantage should have been taken of any previous default, *I.*, his heirs or assigns, might sell. In 1830, *I.* having called for payment, a deed of transfer was executed to *K.* and *R.* This deed, after reciting that *I.* was entitled to the prior mortgage for £3,000, recited the mortgage of 1825, and that in “the now reciting indenture a power of sale is contained for the better securing of the principal sum and interest, but the said power has not been, and is not intended to be exercised,” and recited the calling in of the mortgage moneys, and that *D.* had applied to *K.* and *R.* to discharge them, “which *K.* and *R.* have agreed to do on having the said sums so agreed to be advanced as aforesaid, secured to them by an assignment of the said several securities hereinbefore recited, and generally in the manner hereinafter appearing.” Then, in consideration of £30,000 paid to *I.* by *K.* and *R.*, *I.*, at the request of *D.*, assigned, and *I.* confirmed to *C.* and *R.*, the moneys due on the mortgages, “and all powers and remedies for recovering the same sums respectively, and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained.” Then *I.* conveyed and *D.* confirmed to *K.* and *R.* in fee, the mortgaged estates, subject to a proviso for redemption, if *D.* should pay the principal of £30,000 on the day therein named, being at the expiration of seven years, and should in the meantime pay interest half-yearly on the days therein named. It was agreed that the money should

remain on the security for seven years, *D.* not to be at liberty to pay it off sooner, and *K.* and *R.* not to call for payment sooner, unless default was made in payment of interest, or *D.* died. There was a power of sale to arise if default should be made in payment of the principal or interest contrary to the terms of the proviso for redemption; and a covenant by *K.* and *R.* that no sale of the property should be made without three months' notice. The persons claiming under *K.* and *R.* having put up the property for sale, the purchasers objected that the power of sale in the deed of 1825 was gone, and that the vendors could not make a good title as against mesne incumbrancers:—

*Held*, (reversing the decision of the Master of the Rolls,) that the power of sale in the mortgage of 1825 was still subsisting, and capable of being exercised. *Boyd vs. Petrie*, L. JJ., 385; vol. vii.

FRAUD.—See PURCHASE FOR VALUE, WITHOUT NOTICE.

GIFT.—See WILL.

ISSUE THEN LIVING.

No limitation after an estate tail is void for remoteness, and it makes no difference whether the limitation be directly to a class or to trustees to sell and divide among such class, provided the legal and beneficial interests be ascertainable at the determination of the estate tail.

If a clause in a will offends against the rule against perpetuities, yet, in construing the will, such clause can not be disregarded, but must be read as the expression of the testator's intention as though no such rule existed.

A testator directed his trustee, after the failure of limitations for life and in tail, to sell his real estate, and pay a share of the proceeds to the children, other than *J. G. H.*, of *A. H.*, "then living," and the issue of such as should be then dead, leaving issue, and the issue of *J. G. H.*, share and share alike, the issue of the said children of *A. H.* to have no greater share than their parent would have had if living; and the issue of *J. G. H.* to share on the same footing. The testator gave another share to *C* for life, and after her death to the children of *A. H.* then living, and their issue, in the same words as in the gift of the former share.

At the close of the will, the testator added a proviso that if his real estate should ever be sold under the limitations thereinbefore contained, and the money should become payable to the issue of *A. H.*,

or the issue of *J. G. H.*, and any of such issue should be then dead, leaving lawful issue, then the issue of such issue as should be so dead should receive the share which his or her parent would have been entitled to if living. The estates tail failed, and the proceeds of the sale became divisible:—

*Held*, (reversing the decision of *Malins, V. C.*), that the proviso at the end of the will was not void for remoteness:

That the “issue” of the grandchildren of *A. H.* must be confined to their children:

That where a grandchild of *A. H.* died before the period of distribution, leaving children, such children took the share which their parent would have taken if he had been alive at the period of distribution, even in a case where the grandchild died before his parent in the lifetime of the testator, and before his will:

That the gift to the grandchildren created a joint tenancy *inter se*, but the effect of the proviso was, that in the case of a grandchild dying leaving issue, the joint tenancy was severed as to his share: *Heasman vs. Pearse*, L. JJ., 275, vol. vii.

JOINT TENANCY.—See ISSUE THEN LIVING.

LEGAL ESTATE.—See PURCHASE FOR VALUE.

LIFE ESTATE.—See VOLUNTARY SETTLEMENT.

LIMITATION.—See ISSUE THEN LIVING.

MORTGAGE.—See EXTINCTION OF POWER; PURCHASE FOR VALUE, WITHOUT NOTICE.

MORTMAIN.—See WILL.

NATURALIZATION ACT.—See ISSUE THEN LIVING.

NOTICE.—See PURCHASE FOR VALUE, WITHOUT NOTICE.

POWER OF SALE.—See EXTINCTION OF POWER.

PROVISO.—See ISSUE THEN LIVING.

PURCHASE FOR VALUE, WITHOUT NOTICE.

The defense of purchase for value without notice may be sustained, although the defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the plaintiff, the defendant not having had notice of such instrument at the time of his purchase.

The trustees of a settlement advanced the trust money on the security of real property, which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards re-conveyed part of the property to the mortgagor, on payment of part of the mortgage money which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the re-conveyance. When the fraud was discovered, the *cestui que trust* under the settlement filed a bill against the new mortgagees, claiming priority:

*Held*, that the Court would not interfere to take away the legal estate which passed to the new mortgagees under the re-conveyance.

The trustees of a settlement advanced the trust money on the security of real property, which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mortgagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and shewing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:

*Held*, that the Court would not interfere to take away the legal estate from the mortgagee.

Decree of the Master of the Rolls reversed.

*Carter vs. Carter*, (3 K. & J., 617,) disapproved of. *Pilcher vs. Rawlins*, L. C., & L. JJ., 259, vol. vii.

## RAILWAY.

*Duration of Agreement to take Land—Purposes of Railway—Evidence that Land is required.*

A landowner agreed with a railway company to sell them ten acres of land and one acre for a station, at a certain price, and that if the company should require more land for the station, or for any purpose, they should pay for the same at the rate of £100 per acre, and the agreement was to be supplemental to the *Lands Clauses Act*. The ten acres were paid for and conveyed. Before the compulsory powers of the company had expired, they gave, (apparently by mistake,) notice to treat for three acres more, and before the time for completion had expired, they took possession of these three acres, alleging that they required the land. They also took possession of some small pieces of land which were covered by earth slipped from the railway:



*Held*, that, under the agreement, the company had power, until the expiration of the time limited for the completion of the railway, to take such land as they required for the purpose of a station, or for slips of earth, at £100 an acre.

The Court will accept as conclusive the evidence of the engineer in the service of the company as to the quantity of land required for the purposes of the railway, if the statement has a reasonable appearance of accuracy.

Decree of Bacon, V. C., reversed. *Kemp vs. South-Eastern Railway Company*, L. C., 364, vol. vii.

RE-CONVEYANCE.—See PURCHASE FOR VALUE, WITHOUT NOTICE.

REMAINDER.—See ISSUE THEN LIVING.

REVERSION.—See VOLUNTARY SETTLEMENT.

SETTLOR.—See VOLUNTARY SETTLEMENT.

SPECIAL CASE.—See WILL.

STATEMENT TO DISCREDIT WITNESS.

A witness, who made an affidavit on behalf of the plaintiff, had previously made a statement, which the solicitor for the defendant had taken down in writing, and alleged to be inconsistent with his affidavit. The solicitor filed an affidavit on behalf of the defendant, and made this statement an exhibit:—

*Held*, that the exhibit was not admissible in evidence.

The right of a trustee, in whose name shares in a company were standing at the time of its being wound up, to indemnity from his *cestui que trust*, enforced by the liquidator in a suit in the name of the trustee who had compromised with the liquidator for his liability on the shares upon terms including a stipulation that the liquidator should be at liberty to continue the suit.

Decree of *Malins*, V. C., affirmed. *Hemming vs. Maddick*, L. JJ., 395; vol. vii.

TRUST.—See CONVERSION; PURCHASE FOR VALUE WITHOUT NOTICE.

VOLUNTARY SETTLEMENT.

In order to support a voluntary settlement, it must be shown that all the provisions are proper and usual; or if there are any unusual

provisions, that they were brought to the notice of and understood by the settlor.

No general rule can be laid down as to the proper and usual provisions in such a settlement, but a power of revocation is not essential.

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by the solicitor, to execute a settlement by which he assigned a part of the money to trustees on trust to invest and to pay him during his life the income on such part thereof as they should think fit, after his death, on trust to hold the same for his wife and children, if any, and subject thereto on trust for certain cousins of his. He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice:—

*Held*, (affirming the decree of *Stuart*, V. C.,) that the deed could not be set aside by the settlor.

*Coutts vs. Acworth*, (Law Rep., 8 Eq., 558;) *Wollaston vs. Tribe*, (Law Rep., 9 Eq., 44;) *Everitt vs. Everitt*, (Law Rep., 10 Eq., 405,) considered; *Phillips vs. Mullings*, L. C., 244; vol. vii.

#### VOLUNTARY SETTLEMENT.

In order to maintain a voluntary deed of gift from a son for the benefit of a father, it must be shown both that the son understood the contents of the deed, and that he was not under undue parental influence.

A voluntary deed of gift can not, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion.

Part of a voluntary settlement may be set aside.

Under a marriage settlement, the son of the marriage was entitled to the reversion expectant of the life estate of the father in two sums of money, one of which had come from the father's side, the other from the mother's side. The son had also a large income under the will of his grandfather, and would have a much larger income on attaining the age of twenty-five years. The son had lately attained the age of twenty-one years, and was residing with his father. The son, without employing a separate solicitor, executed a deed, giving to his father's second wife and her daughter, the reversion in both the sums which were included in the marriage settlement, and giving to the father power to appoint the sum which came from the mother's side to any third wife and her children. The son left the father's

house five years after the execution of the deed, and employed a separate solicitor two years afterwards, when the subject of setting aside the deeds was mentioned. Seven years afterwards, the son filed a bill to set aside so much of the deed as related to the sum which had come from the mother's side:—

*Held*, on the facts of the case, that though the son understood all the contents of the deed, except the power to appoint to a third wife and her children, he was not sufficiently protected from parental influence and that if the bill had been filed at an earlier time the deed must have been set aside to the extent prayed, but

*Held*, that, as the filing of the bill had been so long deferred, the deed must be rectified only by striking out the power.

Decree of *Malins*, V. C., varied. *Turner vs. Collins*, L. C., 329; vol. vii.

#### WILL.

#### *Construction—Estate by Implication—Directions to settle on Marriage under Twenty-one—Special Case.*

A testator directed that his trustees should hold certain personal property in trust for his daughter S., until his granddaughter M. S., should attain twenty-one, or marry under that age with the consent of her guardians; and when his said granddaughter should attain twenty-one, or before, upon her marriage with such consent, upon trust to pay the income to his said granddaughter for her life for her separate use; and in case of her marriage with such consent, but not otherwise, the property was to be settled on her for life for her separate use, with remainder to her children; and in default of issue, to be at her absolute disposal.

The testator gave other property on like trust, for his other granddaughters, and referred to the property as the "provisions" and the "portions" of his granddaughters. Then followed a gift over on the death of any granddaughter under twenty-one, and without having been married, upon trust for the others in like manner as their original portions; and if all should die under twenty-one, and without having been married, then the shares were to fall into the residue. Two of the granddaughters attained twenty-one, but were still unmarried:—

*Held*, (affirming the decision of Wickens, V. C.,) that there was no absolute interest given by implication to the granddaughters on their attaining twenty-one, without being married; but that they had only

an estate for life, subject to any question which might arise in case either of them married: *Savage vs. Tyers*, 356, vol. vii.

*Mortmain—Gift to erect or endow a Church—Endowment of Future Church—Impracticable Object—Cy-pres—43 Geo. 3, c. 108.*

A gift for the endowment of a future church is not void under the *Mortmain Act*.

A testatrix gave the residue of her personal estate to trustees upon trust to be by them applied in aid of erecting or endowing an additional church at A.:—

*Held*, (reversing the decision of Bacon, V. C.,) that the gift was not intended to be confined to a church to be erected or commenced before the death of the testatrix, but was applicable to any future church.

An inquiry was directed whether the residuary personal estate could be employed in aid of erecting or endowing an additional church at A.

Whether the Court will hold a fund for an indefinite time which, has been given for a charitable object, where there is no reasonable prospect of carrying it into execution—*Quære*.

Whether the doctrine of *cy-pres* applies where there is a gift to a particular object which there is no reasonable prospect of carrying into execution—*Quære*.

Where pure and impure personalty is given to trustees to erect or endow a church, they are entitled, under the 43 Geo. 3, c. 108, to £500 out of the impure personalty, in addition to the whole of the pure personalty: *Sinnett vs. Herbert*, 231, vol. vii.

See ISSUE THEN LIVING.

*Digest of English Law Reports for May and June, 1872.*

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(COMMON LAW SERIES.)

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AUCTION ON PREMISES.—See EJECTMENT.

BREACH OF COVENANT.—See EJECTMENT.

## CONSIDERATION.

*Contract—Guarantee—Withdrawal of Petition—Forbearance.*

The plaintiff having presented a petition for winding up a company, the defendants signed the following guarantee: "In consideration of your withdrawing the petition you have presented for winding up the company called John King & Co., Limited, we agree to pay you all the costs you have incurred of and in relation to such petition, and to indemnify you against all costs (if any) you may be liable to pay to the company, or to any other parties appearing for or in reference to the petition. We further agree to guarantee the payment to you, within eighteen months from this date, by the company or the liquidator thereof, of the principal of your debt of 722*l*." In an action on the second branch of the guarantee:—*Held*, that the consideration applied to both promises; that the consideration was the withdrawal of the then pending petition, and not the forbearing for eighteen months to proceed with any petition to wind up the company; and that such a consideration was sufficient to support the promise. *Ross vs. Moss* (Cro. Eliz., 560) questioned. *Quære*, whether, if the presenting of a second petition had had the effect of preventing the company from paying the debt, the surety would have been discharged: *Harris vs. Venable et al.*, Ex., 235, vol. vii.

CONTRACT.—See CONSIDERATION.

COVENANT.—See EJECTMENT; LANDLORD AND TENANT.

DECEASED PARTNER.—See PARTNERSHIP.

## EJECTMENT.

*Landlord and tenant—Forfeiture for Breach of Covenant—Waiver of Forfeiture—Covenant not to permit Auction on Premises.*

In an indenture of lease, of the 23d of March, 1860, from plaintiff to C., was a covenant by C. not to permit a sale by auction on the

premises without plaintiff's consent, with a proviso for re-entry on non payment of rent, or breach of any of the covenants. On the 11th of April, 1867, C. assigned the goods on the premises by a deed of mortgage, with power to the mortgagees, in default of re-payment of the loan, to sell the goods by auction on the premises. On the 22nd of April C. mortgaged the premises by under-lease to defendant, with a proviso that C. should retain possession of the premises so long as he paid the loan by certain instalments, and was not bankrupt, and did not enter into any deed for the benefit of creditors; but that on default in payment, or any breach of the foregoing proviso, defendant might enter and take possession, &c. On the 30th of April C. executed a deed conveying all his estate and effects to trustees for the benefit of creditors. C. remained in possession of the premises, and in his absence, on the 23d of May, the mortgagees, acting under the deed of assignment of the 11th of April, sold the goods by public auction on the premises, without plaintiff's consent. Plaintiff thereupon brought ejectment; and, on the above facts, the jury found that the sale by auction took place by permission of C: *Held*, that C. had power to give permission for the sale, notwithstanding his conveyance of the premises after the deed granting the power of sale; and that a forfeiture had therefore been incurred. In ejectment by landlord under a proviso for re-entry on breach of covenants, plaintiff, under an order for particulars, gave as breaches the permitting a sale by auction on the premises without plaintiff's consent, and the non-payment of rent accrued due since the sale. Defendant obtained a judge's order staying the action as to the breach for non-payment of rent on payment of the rent to plaintiff, or into court, if he refused it. Plaintiff refused the rent, and it was paid into court. At the trial the forfeiture by the sale by auction was proved: *Held*, affirming the judgment of the Court of Queen's Bench, that there had been no waiver of the forfeiture. *Toleman vs. Portbury*, Q. B., (Ex. Ch.,) 354, vol. vii.

EXECUTOR.—See WILL.

FORBEARANCE.—See CONSIDERATION.

FORFEITURE.—See EJECTMENT.

GUARANTEE.—See CONSIDERATION.

## LANDLORD AND TENANT.

*Covenant for quiet Enjoyment—Restriction by Covenant of Lessor as to particular Trade.*

On a conveyance of land to defendant in fee, defendant covenanted with B., the vendor, that defendant and his assigns would not permit to be carried on in any building, built on any part of the land, the trade of a seller of beer. Defendant afterwards demised for twenty-one years a building on part of the land, which at that time was used as a grocer's shop; the lessee covenanted that he and his assigns would not carry on therein, or permit to be carried on, certain trades, (that of a seller of beer not being one,) and defendant covenanted that the lessee and his assigns should peaceably enjoy the demised premises without any lawful let, suit or interruption by or from defendant or any person lawfully claiming from, by, or under him. This lease was assigned to plaintiff; and he, without notice of defendant's covenant with B., altered and fitted up the premises as a beershop, upon which B. obtained an injunction from the Court of Chancery restraining plaintiff from carrying on the trade of a beer-house on the premises. Plaintiff then brought an action against defendant for a breach of the express or of an implied covenant in the deed of demise: *Held*, affirming the judgment of the Court of Queen's Bench, that the express covenant for quiet enjoyment excluded any implied covenant; and that that covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not mentioned in the restrictive covenant on his part; and therefore, that plaintiff could not recover: *Spencer vs. Marriott*, (1 B. & C., 457; 2 D. & Ry., 665,) affirmed. *Dennett vs. Atherton*, Q. B., (Ex. Ch.,) 316, vol. vii.

See EJECTMENT.

LIABILITY.--See PARTNERSHIP.

## MORTGAGE.

*Notice of Grant within 4 Anne, c. 16, s. 10—Pre-payment of Rent.*

In July, 1864, L. demised premises to the defendant for five years at a rent of 55*l.* per annum, payable quarterly. Immediately after the grant of the lease, defendant advanced to L. 170*l.* on account of rent; and in September, 1865, L. mortgaged the premises to plaintiff. In May, 1866, B., who claimed under a prior mortgage from L., dated in September, 1858, through C., his attorney, commenced an



action of ejectment against defendant to recover possession of the premises, but did not proceed with it; and on the 1st of November, 1866, plaintiff's attorney wrote to defendant: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next:" *Held*, that the pre-payment of rent was no bar to plaintiff's claim to the rent accruing after defendant had notice that plaintiff was grantee of the reversion; and that the above letter, coupled with the circumstances known to defendant, that he was raising money by mortgaging his reversion, and that the plaintiff's claim, for rent, could hardly be founded upon any other alleged right than one resulting from a grant of the reversion, would warrant a jury in inferring the defendant had notice that plaintiff was such grantee: *Cook vs. Guerra*, 132, vii.

#### PARTNERSHIP.

*Sharing Profits—Liability as Partners of Executors of a Deceased Partner—Partnership Act, 1865, (28 & 29 Vict. c. 86.)*

By articles of partnership T. F., W. F., and S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital and to share profit and loss equally; and if either died during the partnership term, the surviving members of the firm were to continue the business, and were to pay to the personal representatives of the deceased partner the share of the profits to which he would have been entitled if living. T. F. died during the partnership term. At the time of his death the firm had no capital, except office furniture and fittings, worth about 100*l.* They had in their hands a sum of between 400*l.* and 500*l.*, which was the proceeds of debts due to a former firm in which T. F. was a member, and left in the hands of the new firm for collection; and this sum belonged beneficially to T. F. T. F. was also entitled, in respect of his share of profits beyond the amounts which he had drawn, to a sum of about 200*l.* After the death of T. F., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm and to earn profits. The executors of T. F. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to which T. F. would have been entitled if living. No settlement of accounts in respect of T. F.'s interest in the partnership business was made between his executors and the surviving partners. Sums of money, amounting in the whole to about 625*l.*, were from time to time paid by the firm to the execu-

tors. These payments were made generally, and not on any particular account. After the death of T. F., the firm were employed by the plaintiff to sell property; they sold the property and received the proceeds, but did not pay over the same to the plaintiff. In an action brought (after the death of S.) against the executors of T. F. and W. F.: *Held*, that the executors of T. F. were not liable as partners. The Partnership Act, 1865, (28 & 29 Vict., c. 86,) considered: *Holmes vs. Hammond*, Ex., 218, Vol. vii.

PETITION.—See CONSIDERATION.

RENT.—See MORTGAGE.

RESTRICTION.—See LANDLORD AND TENANT.

RESIDUARY LEGATEE.—See WILL.

TRUSTEE.—See WILL.

WAIVER.—See EJECTMENT.

WILL.

*Executor According to the Tenor—Trustee.*

1. Unless the Court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof: *In the goods of Punchard*, 369.

*Residuary Legatee—Failure of Trust Ascertained.*

2. A deceased, by his will, devised and bequeathed the residue of his real and personal estate to trustees, in trust for the benefit of his children; but in case of the failure of such trust for such of his two brothers as should be living at the time of the said failure of trust ascertained. At the time of his death the testator had no child, and his wife was not *enceinte*; one brother died a fortnight after the testator: *Held*, that the failure of the earlier trust, although not known, was determined on the death of the testator, and the residue vested at that time in the brothers, and therefore that the executors of the deceased brother, on the citation and non-appearance of the other brother, were entitled to a grant of administration with the will annexed, of the goods of the deceased: *Sidebottom vs. Sidebottom*, 365.

## SELECTED DIGEST OF STATE REPORTS.

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[For the present number of the Digest, selections have been made from the following State Reports: 40 California, (continued from July number;] 37 Connecticut; 55 Illinois; 31 Iowa; 48 Missouri; 7 Nevada; 21 Ohio; 68 Pennsylvania.]

### ACCORD AND SATISFACTION.

*Contract—Receipt embraces what matters—Construed, how.* A receipt given in satisfaction of a judgment, and “all claims and demands,” does not, on its face, include matters not embraced in the judgment. But the receipt must be interpreted and construed from existing facts, and in the light of surrounding and co-temporary circumstances. (*Grumley vs. Webb*, 44 Mo., 456.) And if the parties to the receipt clearly and manifestly intended to include in it other claims besides the judgment, courts will interpret the contract accordingly. *Grumley vs. Webb*, 48 Mo., 562,

ACCOUNT.—See ADMINISTRATION, 5.

### ADMINISTRATION.

#### *Lease—Account.*

1. After the death of a lessee for years, the lease is the property of the administrator, whensoever appointed, for the benefit of the estate.

2. The widow of the lessee was dispossessed under the act of December 14th, 1863, before the expiration of the lease, on the allegation, which she denied, that she had surrendered it and taken a new one which had expired. *Held*, in an appeal from the judgment of the justice, that the lease was evidence that the term had not expired, and that she had not taken a new lease.

3. The premises were a tavern; the license was evidence on the question of damages.

4. Her letters of administration were evidence as showing the character in which she was entitled to recover.

5. The administration related to the death of her husband, and rendered her liable to account as administratrix, for any disposition made of the lease with or without her consent: *Keating vs. Condon*, 18 Smith's Reports, (68 Penn.)

ADMISSION.—See TENDER, 1, 2.

ADVANCEMENT.—See EVIDENCE, 15, 16.

#### AGENT.

1. *Power of Agent—Contract of Sale—Execution of, under Verbal Authority to Sell.*—A verbal authority to an agent to sell real estate, is not sufficient to authorize the agent to execute a contract of sale in the name of his principal, or to sign the name of the latter to such contract. *Duffy vs. Hobbs*, 40 Cal., 240.

2. *When Principal Liable for Unauthorized Acts of Agent.*—Where, in an action against Wells, Fargo & Co., it appeared that plaintiff delivered an old certificate of deposit to the agent of the company, for the purpose of having it sent to San Francisco to be renewed; and the agent fraudulently procured it to be cashed, and appropriated the money to his own use: *Held*, that Wells, Fargo & Co., were liable, not upon the rule that the agent acted for his principal in that particular transaction, but because he was employed by the company in that character of business, and held out by it as a person authorized and fully to be trusted: *Dougherty vs. Wells, Fargo & Co.*, 7 Nevada, 368.

See AGENCY. EVIDENCE, 10.

#### AGENCY.

1. *Corporations, Powers of—Liability of Agents—Sureties.*—A corporation can only exercise the powers expressly granted by its charter, or necessary to carry out some express power; and therefore a surety for one as agent for a corporation, is limited to such acts as the corporation is authorized to require of its agents. But where the charter grants powers "to buy, exchange, sell, mortgage, transfer, or otherwise use its property," under these powers it might legally loan out its surplus funds, and the right to accept security for such loan follows as a necessary incident; and where gold was deposited with a corporation as collateral security for a loan, the title thereto vested lawfully in the corporation; and where an agent of the corporation converted such gold to his own use, his sureties were liable therefor. *Western Boatmen's Benevolent Association vs. Kribben*, 48 Mo., 37.

2. *Power of Attorney to Compromise Suit for Client.*—An attorney employed in the usual way to conduct a suit, has, in general, no authority to enter into a compromise without the sanction, express or implied, of his client: *Grumley vs. Webb*, 48 Mo., 562.

ALIENATION.—See CORPORATION, 3.

APPEAL.

1. *Appeal from Order denying a New Trial after Dismissal of Appeal from Judgment.*—The fact that a direct appeal from the judgment has been dismissed, does not place the appellant in a different or more unfavorable position, in respect to his appeal from an order denying a motion for a new trial, than he would have occupied had no direct appeal from the judgment ever been taken: *Fulton vs. Hanna*, 40 Cal., 278.

2. *Reversal on Appeal.*—A reversal on appeal from an order denying a motion for a new trial, and remanding the cause for re-trial, as effectually vacates the judgment as a reversal of the judgment upon a direct appeal therefrom: *Id.*

3. *Consideration on Appeal of Evidence explaining Points of Law.*—Though the Supreme Court can not, where there has been no motion for a new trial, weigh the evidence for the purpose of determining whether a verdict or judgment is sustained by it, yet any question of law arising at the trial and properly excepted to can be reviewed without a motion for new trial; and in such case, as much of the evidence as may be necessary to explain the legal question may be taken up and considered: *Cooper vs. Pacific Mutual Life Ins. Co.*, 7 Nevada, 116.

4. *Clerical Mistake in Judgment—Errors not Noticed Below.*—Where, on appeal from a judgment it appeared that there was a clerical mistake in the rate of interest, but such mistake had not been brought to the attention of the court below: *Held*, that the Supreme Court would not notice it: *McCausland vs. Lamb, Ib.*, 238.

5. *No Consideration of Insufficiency of Evidence on Appeal where no Motion for New Trial.*—Where there is no motion for new trial, the Supreme Court will not consider an objection that the findings are not justified by the evidence: *James vs. Goodenough, Ib.*, 324.

APPLICATION.—See INSURANCE, 13, 14, 15, 16.

ASSAULT.

1. *Assault.—Damages.*—A party guilty of a wanton, malicious and unprovoked assault upon the person, is liable for exemplary damages: *Wade vs. Thayer*, 40 Cal., 578.

2. *Idem.—Liability of Employer for Assault by Employee.*—An employer, though not present, and in no manner consenting to or aiding the assault, is liable for the actual damage sustained in an assault

upon the person, committed by his servants or employees, while in the performance of their duties as such: *Id.*

ATTACHING CREDITORS.—See **BILLS AND NOTES**, 3, 4, 5, 7.

ATTORNEY.—See **AGENCY**, 2.

AUTHORITY.—See **AGENT**, 2.

### BAILMENT.

*Warehousemen—Destruction by fire.*—Where a consignor deposits certain wheat for storage with warehousemen, under the agreement that they will re-deliver it to him on demand, and they, without authority, sell and ship the wheat, and thereafter a demand is made for the wheat, it is no defense, in an action by the consignor to recover the value of the wheat, that the warehouse of defendants was, subsequent to the demand, destroyed by fire, consuming all its contents, among which was wheat of a like quality as that stored by plaintiff, and with which they could have replaced it: *McGinn vs. Butler*, 31 Iowa, 160.

### BILLS AND NOTES.

1. *Consideration, sufficiency of.*—Where a promissory note is made in consideration of the assignment, by the payee to the maker, of a contract, and the maker of the note derived under such assignment all the advantages which could flow from a valid and operative assignment, the consideration is sufficient for the note, although the assignor may have had no assignable interest in the contract so as legally to be able to transfer the same: *Hudson vs. Busby*, 48 Mo., 35.

2. *Guaranty—Notice not Necessary to render Guarantor liable, when*—The words, “I assign the within note to A. for value received, and guaranty its prompt and full payment,” indorsed by the payee on the back of the note, impose upon the assignor an absolute obligation to pay, and no demand or notice of the maker’s default is necessary to render him liable: *Wright vs. Dyer*, 48 Mo., 525.

*Attaching Creditor—Transfer—Holder for value.*

3. A promissory note may be attached before maturity in the hands of the maker by a creditor of the payee.

4. It is a debt within the meaning of the attachment laws, and, as between payee and attaching creditor, is bound by the service of the attachment on the maker.

5. The attachment is unavailing against a *bona fide* holder or indorsee for value to whom the note has been transferred before maturity, without actual notice of the attachment.

6. In such case notice from *lite pendente* does not apply.

7. D., March 1st, 1866, made a negotiable note to M., payable in two years. An attachment at the suit of Z., a creditor of M., was served on D., as garnishee, November, 1867. M. indorsed the note February 22d, 1868, to Y. *bona fide* for value, Y. having no notice of the attachment, but knowing that M. had failed. D. paid the note to Y. *Held*, that it was discharged, and D. not liable under the attachment: *Day v. Zimmerman*, 18 Smith's Reports, 68 Penn.

See ESTOPPEL, 3.

BOND.—See INTERPLEADER, 3, 5, 7.

### BOUNDARY.

1. *Measurement of Distance on a Navigable Stream*.—Where a certain distance is called for from a given point on a navigable stream to another point on the stream, the measurement must be made by its meanders, and not in a straight line: *People vs. Henderson*, 40 Cal., 29.

2. *Idem—On a Public Highway*.—The same rule prevails when the distance is called for upon a traveled highway: *Id.*

3. *Boundary on a Navigable Stream*.—When a tract of land is bounded upon a navigable stream, the distance upon the stream will be ascertained—in the absence of other controlling facts—by measuring in a straight line from the opposite boundaries: *Id.*

BREACH OF CONDITION.—See CONSTRUCTION OF CONTRACT, 4.

BURDEN OF PROOF.—See CONTRACT, 12.

### CERTIORARI.

1. *Certiorari—Inadmissible Return—Motion to Strike Out*.—Where on certiorari to review the proceedings of the board of equalization in reference to the reduction of an assessment against a railroad company, the clerk of the board was directed to certify whether it appeared before the board that the company served a statement of its taxable property within the time prescribed by law; and the clerk returned a certificate that it was proved before the board that such a statement had been furnished within the time, but went on to show that his certificate was based upon the sworn statements of others,



who composed the board at the time, and not upon his own recollection or the records of the board: *Held*, that such certificate was entirely inadmissible; and on motion it was stricken out: *State ex rel. Thompson vs. Board of Equalization of Washoe County*, 7 Nevada, 83.

2. *Certiorari—What Return may Include.*—Though the return to a writ of certiorari may include, in addition to the record properly so called, such orders and proceedings in the nature of record, and so much of the evidence as may bear upon the question of jurisdiction, it can not include matter which is neither a part of the record nor of the proceedings before the inferior tribunal, such as affidavits presented to the clerk of such tribunal after the issuance of the writ, or his certificate based thereon: *Ib.*, 83.

3. *Certiorari—Weight of Evidence not Subject to Review.*—Where on certiorari from an order of county commissioners discharging a supplemental assessment, the record showed that the commissioners acted within their jurisdiction; and it was objected that the evidence was in conflict with the order: *Held*, that the question as to how they acted was not a subject of review on certiorari: *State ex rel. Mason vs. Ormsby County Commissioners*, *Id.*, 392.

CESTUI QUE TRUST.—See WILL, 3.

## CHANCERY.

### *Master's Report.*

1. When jurisdiction rightfully exists in a court of equity, it is not in conflict with law or the constitution, or the right of trial by jury, for the court to appoint a master to report the facts and such a decree as he may deem proper to be made by the court.

2. The court should in such case so regulate the practice as to secure the most accurate and full development of a case in aid of its own functions.

3. The proceeding before a master is not a trial which judicially determines the rights and liabilities of the parties with a bare appeal to the court.

4. The proceeding before a master is to develop the rights and liabilities of the parties for the consideration of the court; the party dissenting bringing the real points of controversy before the court by exceptions.

5. What shall be referred to a master is a matter in the discretion of the court; his province is merely ancillary.

6. The effect of the appointment of a master is to bring into his report the facts and a proper decree, and also his deductions of facts and conclusions of law, in order to arrive at a decree.

7. No report is conclusive.

8. The court give great weight to a master's report, because of his superior opportunities of judging of the credibility of witnesses, and the effect of their testimony.

9. When the fact is merely a deduction from other facts reported by him, his conclusion is simply a result of reasoning, of which the court is as competent to judge as he.

10. The report of a master is neither a decision nor an infallible guide, but an instrumentality to aid the court in performing its own functions.

11. The principle in *Bank vs. Reese*, 2 Casey, 143, and *Musgrave vs. Beckendorff*, 3 P. F. Smith, 310, applies only where by refusal to perform the contract, the plaintiff suffers the loss in the advance price of the stock to be conveyed: *Phillip's Appeal*, 18 Smith's (68 Penn.) Reports.

#### CHATTELS.

*Exchange of—Warranty—Fraudulent affirmation—In pari delicto.*

1. An exchange of real estate has a warranty in law incident to it, giving a re entry as well as a recovery in value.

2. To make such assurance, it is indispensable that the word "exchange" should be used.

3. An exchange of chattels has not the same effect.

4. There is incident to an exchange of chattels an implied warranty of title, and on a breach a recovery in damages.

5. When one of the parties knows he has no title, it is a fraudulent affirmation which taints the transaction, and enables the other to avoid it and reclaim his property.

6. Saylor exchanged horses with Drum, knowing that Drum had stolen the horse. Bixler, with the same knowledge, bought Saylor's horse from Drum. The owner of the stolen horse took it from Saylor; he being *in pari delicto* with Bixler, could not recover from him.

7. The maxim, *In pari delicto melior est conditio possidentis*, applied: *Bixler vs. Saylor*, 18 Smith's (68 Penn.) Reports.

CLIENT.—See AGENCY, 2.

CLERICAL MISTAKE.—See APPEAL, 4.

COLLECTIONS.—See CONSTABLES.

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COMPROMISE.—See AGENCY, 2.

CONDITION.—See BREACH OF CONDITION, WILL, 7.

CONSIDERATION.—See BILLS AND NOTES, 1.

### CONSTABLES.

*Collections by.*—*Statute of Limitations begins to run, when.* The cause of action against a constable for failing to account for moneys collected by him, does not accrue so as to put in motion the statute of limitations, until there has been either a demand of payment by the parties, or until the officer has made a proper return or report, showing that the money had been realized: *Kirk vs. Sportsman*, 48 Mo., 383.

### CONSTRUCTION OF CONTRACT.

1. *Construction of Contracts.* In construing contracts, it is impossible to prescribe any general and uniform rule by which the question whether the time within which an act is to be performed is of the essence of the agreement, but each case must be decided upon its own circumstances: *Steele vs. Branch*, 40 Cal., 4.

2. *Idem.*—The general rule of equity is, that time is not of the essence of the contract: *Id.*

3. *Idem.*—In a contract for the sale of land which contains a covenant that the vendees shall, as a part of the consideration, discharge and satisfy at its maturity, a mortgage thereafter to become due, and which also contains a stipulation to the effect, that, should the vendees fail to comply with their part of the agreement, the contract shall be null and void, and the land shall revert to the vendors—time is not of the essence of the contract, and the provision in the contract that the land shall revert to the vendors in case the vendees fail to comply with its provisions, is inserted by way of penalty, to induce a prompt performance of the contract, and would not *ex proprio vigore* work a forfeiture for failure to perform strictly in point of time, where the vendees acted in good faith, and the vendors were not damaged thereby: *Id.*

4. *Idem.*—If the contract also contains a covenant that the vendees shall, within a specified period, intermediate between the time of making and the time for the final performance of the same, make certain improvements on the land sold, and also a stipulation to the effect that if the vendees fail to comply with their part of the agreement, the contract shall be held null and void, and the land shall re-

vert to the vendors; should the vendees make default, and no steps be taken by the vendors towards a rescission of the contract until after the expiration of the time for its completion, they will be held as having acquiesced in the breach of the condition, and waived the forfeiture, if any occurred thereby: *Id.*

### CONSTRUCTION.

1. *Construction of Statutes—Legislative intent.*—The intention of the legislature controls the courts, not only in the construction of an act, but also in determining whether a former law is repealed or not; and when such intention is manifest, it is to be carried out, no matter how awkwardly expressed or indicated: *Thorpe vs. Schooling*, 7 Nevada, 15.

2. *Statutory Construction—Title of Act.*—The title of a statute may be considered for the purposes of construction, and especially so when the title is referred to in the body of the act: *Torreyson vs. Board of Examiners, Id.*, 19.

3. *All parts of Statutes to be given Effect if Possible.* No part of a statute should be rendered nugatory, nor any language be turned to mere surplusage, if such consequences can properly be avoided: *Id.*

4. *Construction of Borrowed Clauses of Constitution.*—Where a constitutional provision has been borrowed from another State, after its meaning has been judicially determined by such State, the construction so put upon it is deemed adopted with the language: *Hess vs. Pegg, Id.*, 23.

5. *Statutory Construction—What is Directory.*—No specific requirement of a statute should be dispensed with, or held merely directory, unless it is clearly manifest that the legislature did not deem a compliance with it material, or unless it appears to have been prescribed simply as a matter of form: *Corbett vs. Bradley, Id.*, 106.

6. *Principle of Decisions as to What is Merely Directory.*—When any requirement of a statute is held to be directory and not material to be followed, it is upon the assumption that the legislature itself so considered it, and did not intend to make the right conferred dependent upon a compliance with the form prescribed for securing it: *Id.*

7. *Construction of Policy—Doubts in Favor of Assured.*—If on the face of a policy of insurance there is, in the language used, or its effect, any room for construction or doubt, the benefit of the doubt must be given to the assured: *Gerhauser vs. North British and M. Ins. Co., Id.*, 174.

8. *Interpretation of Language of Policies.*—In the construction of

policies of insurance, such meaning should be given to the language used as plain men usually attach to it: *Id.*

9. *Construction of Grants of Government.*—Grants by the Government must always be construed most favorably to the government; they pass nothing by implication: *Vansickle vs. Haines, Id.*, 249.

Sec ACCORD AND SATISFACTION.—CONTRACT, 5.

CONSTRUCTIVE POSSESSION.—See EVIDENCE, 1, 2.

### CONTRACT.

1. *Contract—Specific Performance.*—Equity will decree specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing the premises for a fixed sum of money, on or before the expiration of the term: *Hall vs. Center*, 40 Cal., 63.

2. *Contract.—Several obligation.*—An agreement by a number of persons, which states that the undersigned “will pay the sum annexed to their names,” in order to make up an aggregate sum to be paid to another party, in consideration of services to be rendered, creates a several and not a joint obligation: *Moss vs. Wilson, Id.*, 159.

3. *Contract in Restraint of Trade.*—A contract by which one of the parties binds himself not to engage in a particular business or occupation “in the city and county of San Francisco, or State of California,” is in restraint of trade, and therefore void, as against public policy: *More vs. Bonnet, Id.*, 251.

4. *Idem.—Not Severable.*—Such a contract is an entire contract, and can not be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to the State of California: *Id.*

5. *Idem.—Contract.—Construction of.*—The question whether a contract is entire or separable, can only be solved by considering both the language and the subject matter of the contract: *Id.*

6. *Idem.—When Severable.*—A contract will generally be held to be severable when the price is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed: *Id.*

7. *Void Contract.*—A contract void in part, and of such a nature that the good can not be separated from the bad, and the part which is good enforced, is an entire contract, and void: *Prost vs. More, Id.*, 347.

8. *Contract.—Contrary to Public Policy.*—An agreement between a judgment creditor and one claiming an interest in the thing about

to be sold under an execution against a third person, that neither shall bid against the other, but that the claimant shall and may buy in the property, is void as contrary to public policy: *Packard vs. Bird, Id.*, 378.

9. *Contract.—Supposed.—Mutual Misunderstanding of Parties.*—A supposed contract of sale, when there is a mutual misunderstanding between the parties as to the amount of the consideration to be paid, is no contract, and a subsequent sale by the supposed seller to a third party, is valid: *Roregno vs. D ferari, Id.*, 459.

10. *No Ratification of Contract without Knowledge of it.*—No act will amount to a ratification of an unauthorized contract, unless the person charged with the ratification is cognizant of all the material features of it; and especially must he have a knowledge of the existence or execution of the contract itself: *Clarke vs. Lyon County, 7 Nev.*, 75.

11. *Ratification Equivalent to Execution of Contract.*—As ratification is after all but the execution of a contract on the part of the person ratifying, such ratification, to be effective, must be done understandingly: *Id.*

12. *Written Insurance Contract Vitiates by Parol.—Material Misrepresentation.—Burden of Proof.*—Though as an ordinary rule, written contracts can not be controlled by antecedent or cotemporaneous statements not embraced in the writing, in the case of a policy of insurance, a recovery may be prevented by proof of verbal misrepresentations which, though undesigned, were material to the risk; but the burden of proof is on defendant to show the misrepresentation, and that it was material: *Gerhauser vs. North British and M. Ins. Co., Id.*, 174.

13. *Insurance, Fire—Contract of—What Acts Essential to.*—The rule of law now is, that a contract is complete when its acceptance is forwarded, without reference to the time of its reception. And any appropriate act which accepts the terms as they are intended to be accepted, so as to bind the acceptor, sufficiently evidences the concurrence of the parties. But mere assent, without notice or other appropriate and binding act, is insufficient. *Lungstrass vs. German Ins. Co.*, 48 Mo., 201.

See ACCORD AND SATISFACTION. AGENT, 1. CONSTRUCTION OF CONTRACT.

## CONTRACT FOR SALE OF LANDS.

*Parol Proof—Admissibility.*

1. The objection that a contract for the sale of lands is not evidenced by writing is not tenable where a part of the purchase money was paid, and the vendee entered into possession under the contract. *Chamberlain vs. Robertson*, 31 Iowa, 408.

2. The plaintiff averred that the defendant being engaged in procuring subscriptions to aid in the construction of a certain railroad, verbally promised the plaintiff that if he would subscribe a certain amount, he (the defendant) would, in case plaintiff sold his farm before the payment of all of said subscription, assume plaintiff's obligation, refund to him the amount paid, and pay the balance himself. *Held*, that parol evidence was not admissible to prove the agreement alleged, in an action against the defendant thereon. *Kauffman vs. Harstock. Id.*, 472.

## CONTRIBUTION.—See MORTGAGE, 2.

## CONVEYANCES.

*Covenants—When merely Personal.*—Although a deed on its face purports to be made by A., B. and C., "trustees," yet if the covenants of grant, bargain and sale, and those of warranty are therein averred to be simply by "the parties of the first part," without further description, the covenants will be held to be merely personal. *Murphy vs. Price*, 48 Mo., 247.

## CORPORATION.

1. *Corporation—Title to Property.*—The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders, as such. *Wright vs. Oroville M. Co.*, 40 Cal., 20.

2. *Idem—Powers of Trustees.*—The Board of Trustees of a corporation may control the corporate property within the limit which the law has assigned to the exercise of corporate authority. *Id.*

3. *Idem.—Alienation of Property.*—Corporate acts, by which corporate property is alienated, if done pursuant to the prescribed mode, and not being in themselves *ultra vires*, are in point of mere law, binding upon the corporate title; and through that title equally binding upon the interest of the stockholders. *Id.*

4. *Idem—Equitable Jurisdiction.*—In dealing with the relations between the corporation and its officers on one hand, and the stockholders on the other, in the management of the corporate affairs,



Courts of equity will look beyond the mere observance of the forms of law, and inquire if the authority has been in good faith exercised to promote the interest of the stockholders. *Id.*

5. *Idem*—*Corporate Authority a Trust*.—The corporate authority is considered to have been conferred by the stockholders upon the trust and confidence that it will be exerted with the view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. *Id.*

6 *Idem*.—A court of equity will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts would amount to a breach of the trust upon which the authority had been conferred. *Id.*

7. *Idem*.—The court will interfere to relieve an injured stockholder from loss after such an act has been done, provided no superior equity has intervened nor the rights of innocent third parties attached. *Id.*

8. *Idem*.—*Right of Stockholders to redeem*.—Where the property of a corporation has been sold under execution, and no steps are taken by the corporate authorities to redeem the property within the period limited by law, a stockholder may interpose and redeem the property for the benefit of the corporation, and hold it liable for the money advanced for that purpose, and by so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the original purchaser at the sheriff's sale. *Id.*

9. *Corporation*—*Special Meeting of Trustees*.—In the absence of a different provision in the charter or by-laws of a corporation formed under the general laws of this State, a special meeting of the Trustees must be called by giving personal notice to each member of the Board of Trustees. *Harding vs. Vandewater. Id., 77.*

10. *Idem*.—In determining whether a given act is within the power of a corporation it is necessary to consider, first, whether it falls within the power expressly enumerated in the certificate; or, second, whether it is necessary to the exercise of one of the enumerated powers. *Id.*

11. *Idem*.—Where a corporation is formed "to buy, improve, lease, sell and otherwise dispose of real estate," etc., the term "improve" includes the performance of any act, whether on or off the land, the direct and proximate tendency of which is to benefit the property or enhance its value. *Id.*

12. *Idem*.—No infallible rule can be laid down defining accurate-

ly the point at which the benefit to be derived from a proposed work would cease to be direct and proximate, but each case must be determined on its own circumstances. *Id.*

13. *Idem*.—A corporation formed for such purposes, and owning lands in the vicinity of a railroad, may properly appropriate a portion of its funds to such railroad for the purpose of increasing the facilities and lessening the cost of transportation on the same, where the direct and proximate tendency of such increase of facilities is to enhance the value of its lands. *Id.*

14. *Corporation—Special Franchise*.—The fact that a party is a corporation in the exercise of corporate powers, does not tend to establish its right to a special franchise. *Schierhold vs. North Beach & M. R. R. Co., Id., 447.*

15. *Corporation—Suit by Stockholders Against Trustees—Pleading*.—In an action by stockholders against the trustees of a corporation, an averment in the complaint, that the defendants are “the duly elected trustees of said company,” is equivalent to an averment that they are the only trustees. *Parrot vs. Byers. Id., 614.*

16. *Idem*.—A denial in the answer that the relation of trustee, and *cestui que trust*, exist between the parties, dispenses with the necessity of averring in the complaint, or proving a prior demand and refusal. *Id.*

17. *Idem—Practice*.—In an action by the stockholders against the trustees of the corporation, the question before the court, relates to the rights of the plaintiffs, as they stood at the commencement of the action, and it is no defense for the defendants that the plaintiffs might have elected a new board of trustees. *Id.*

18. *Idem—Misnomer*.—In an action for an injunction to stay waste, or the asserting of a hostile title by the defendants, and for an accounting, and the relief granted is limited to the injunction prayed for, the fact that a party, only necessary to that branch of the case which relates to the accounting, was sued by a wrong name, does not operate to the prejudice of the defendant, and is immaterial. *Id.*

19. *Idem—Estoppel*.—The trustees of a corporation, who signed the certificate of incorporation, and accepted the office of trustees, are estopped from denying the validity of the act of incorporation. *Id.*

20. *Idem—Transfer of Stock*.—A transfer of stock which has not been entered on the books of the company as provided by the statute, is nevertheless valid as against all the world, except a subsequent purchaser in good faith without notice. *Id.*

21. *Idem—Practice*.—When a suit is brought by several stock-

holders against the trustees of a corporation, the proof that either one of the plaintiffs is a stockholder is sufficient to maintain the action. *Id.*

22. *Idem.—Title—Prior Possession.*—The prior possession by the corporation of the ground in controversy, and the entry into the occupation by the defendants as trustees of the corporation, is sufficient evidence of title to support a judgment in favor of the stockholders. *Id.*

23. *Municipal—Improvement of Streets—Estoppel.*—Where a city charter provided that the councils should have power to cause to be opened, paved and improved any street or alley on the petition of not less than two-thirds of the abutting owners, it was *held*, that a person who joined in such petition was thereby estopped from afterward claiming that the assessment of a tax for the improvement petitioned for was unauthorized and illegal, on the ground that two-thirds of the abutting owners did not join in the petition. While those who did not join in the petition might not be bound, those who did are: *The City of Burlington vs. Gilbert*, 31 (Stiles) Iowa, 356.

24. *Power of trustees to Mortgage—Inhibition to Sell.*—An inhibition upon the board of trustees of a corporation by one of the articles of its corporation to *sell* real estate, is not necessarily an inhibition upon the power to *mortgage*: *Krider vs. The Trustees of Western College*, 31 (Stiles) Iowa, 547.

See AGENCY, 1.

COSTS.—See TRUST FOR CHARITABLE AND RELIGIOUS PURPOSES, 3.

COURT OF EQUITY.—See CHANCERY.

#### COVENANT.

1. *Covenant to Build Dam and Flume not Running with Mill-site.*—Where the owners of a mill-site and water privilege conveyed a portion thereof, and six days afterwards such owners and grantees entered into a contract to erect and keep in repair at joint expense, a dam and flume for conducting water to their respective mills; and subsequently the mill and mill-site of the grantees were sold out on judgment against them: *Held*, that the contract of the grantees to contribute to keep the dam and flume in repair was not a covenant running with the mill-site, and that the purchaser at sheriff's sale was not by his mere purchase liable for any portion of such repairs: *Wheeler vs. Schad*, 7 Nevada, 204.

2. *Covenant Running with Land, how created.*—A covenant to run with land must relate to and concern the land; and if it imposes a burden, it can only be created where there is a privity of estate between the covenantor and covenantee: *Id.*

3. *Covenant Running with Land only made in Favor of One Interested in the Land.*—A covenant real is and can only be incident to land; it can not pass independent of it; it adheres to and is maintained by it; it is in fact a legal parasite; hence it follows that the person in whose favor it is made must have an interest in the land charged with it: *Id.*

4. *Covenant for Performance of Various Acts—When Stipulated Damages mere Penalty.*—Where a covenant is such that it secures the performance or omission of various acts, some of which may not be readily measurable by any exact pecuniary standard, together with others in respect of which the damages on the breach of the covenant are certain or readily ascertainable by a jury, any sum therein agreed upon as damages in case of breach will always be held a mere penalty: *Morris vs. McCoy, Id.*, 399.

See CONSTRUCTION OF CONTRACT, 3, 4; CONTRACT, 1; CONVEYANCES.

COVERTURE.—See MARRIED WOMEN; MORTGAGE, 1.

### CRIMINAL LAW.

1. *Remark of Judge to Jury in Criminal Case to "Agree Quickly."*—Where the judge in a criminal case made a remark to the jury that it was his earnest desire that they should agree quickly: *Held*, that though such remarks had better always be omitted, there was no intimation that the jury need not give the case the most deliberate and careful consideration, and that, as it could not be seen that the remark could result prejudicially to defendant, there was no error: *State vs. Roderigas*, 7 Nevada, 328.

2. *Expression of Judge's Opinion as to Facts in Rulings as to Evidence.*—The opinion of a judge in respect to a matter of fact in a criminal case can be as effectively conveyed to the jury by expressing it in their hearing while ruling upon an objection to evidence, as by embodying it in an instruction to them; and he has no more right to volunteer such an opinion in the one case than in the other: *State vs. Harkin, Id.*, 377.

3. *Attempt to Cure Erroneous Expression of Opinion as to Facts.*—Where a judge in the course of a murder trial, in overruling an ob-

jection to testimony tending to show that defendant had kicked deceased fatally in the breast, remarked, "that there was as much testimony that defendant had kicked deceased upon the chest as upon the face," and afterward took occasion to state to the jury that in making the remark he was simply ruling upon an objection to testimony, and addressing himself more directly to counsel, and that he did not wish to be understood as saying how much or how little testimony there was upon any particular point, and that the whole matter was for them to pass upon: *Held*, that the error of the remark, if curable at all, was not cured by the caution—there being no retraction of his opinion, but merely a disclaimer of opinion as to the absolute weight of such testimony: *Id.*

### DAMAGES.

1. *Measure of Damages—Failure to Deliver Stocks.*—The measure of damages in cases where there is a conversion of or failure to deliver a certain number of shares of stock having no peculiar value, is their market value either at the time of the conversion, when it should have been delivered, or at the time of trial, according to circumstances: *Bowker vs. Goodwin*, 7 Nevada, 135.

2. *Measure of Damages for Loss by Neglect of Administrator.*—Where money of an estate is lost by reason of such neglect of an administrator as he and his sureties are liable for, the sum lost constitutes the measure of damages: *McNabb vs. Wixom*, *Id.*, 163.

3. "*Liquidated Damages*" when held to be mere "*Penalty*."—Where McCoy covenanted with Morris to pay certain debts owing by Morris, and, in case of failure, to pay to Morris \$10,000 as fixed, settled and liquidated damages: *Held*, that the sum so named was to be considered a penalty and not liquidated damages, and that in a suit on the covenant the recovery should be limited to the actual damage with legal interest: *Morris vs. McCoy*, *Id.*, 399.

See ASSAULT, 1; COVENANT, 4; INJURY TO PERSON, 3, 4, 6;  
NUISANCE, 1.

### DEED AS A MORTGAGE.

1. *Deed as a Mortgage—Statute of Limitations.*—Where a deed was executed and delivered as security for a subsisting debt, and it does not appear when the debt thus secured became due, the presumption is that it was due immediately, or upon demand; and if sufficient time has elapsed since the date of the conveyance for the Statute of

Limitations to run, the debt is barred: *Espinosa vs. Gregory*, 40 Cal., 58.

2. *Idem*.—Where an absolute conveyance is thus given as security, the mortgagor retains the right of redemption only, the legal title being in the mortgagee, and the rights of mortgagor and mortgagee are so far mutual, that, when the debt is barred, the right to redeem is also barred: *Id.*

3. *Deed as a Mortgage—Legal Title*.—An absolute deed, although shown by parol evidence to have been intended as a mortgage, conveys the legal title: *Hughes vs. Davis, Id.*, 117.

4. *Idem—Equitable Defense—Offer to Redeem*.—Where a defendant in ejectment, who is the plaintiff's grantor, sets up as a defense that the deed was intended as a mortgage, he must show an offer to redeem before he can be entitled to relief in equity, or deprive the plaintiff of his right of possession under the deed: *Id.*

DELIVERY.—See INSURANCE, 1.

DILIGENCE.—See EXECUTOR AND ADMINISTRATOR, 1.

DISCHARGE.—See INSOLVENT, 1, 2, 3, 5.

DISMISSAL.—See APPEAL, 1.

DOUBTS.—See CONSTRUCTION, 7.

DOWER.—See MORTGAGE, 1, 2.

DYING DECLARATIONS.—See EVIDENCE, 15.

EJECTMENT.—See EXECUTORY CONTRACT, 1.

EQUITY.—See MORTGAGE, 6.

EQUITY OF REDEMPTION.—See MORTGAGE, 2.

EQUITABLE DEFENSE.—See DEED AS MORTGAGE, 4.

EQUITABLE JURISDICTION.—See CORPORATION, 5, 6, 7.

ERRORS.—See APPEAL, 4.

#### ESTOPPEL.

1. *Estoppel*.—Equitable estoppels are founded solely on the theory, that to permit the party to maintain the right which he asserts, would

operate as a legal fraud upon his adversary: *Farish vs. Coon*, 40 Cal., 33.

2. *Idem.*—Where a transfer of property is made under the advice of a third party, neither the party who advised the transfer, nor his assignee with notice, is estopped to deny the validity and sufficiency of the transfer under the Statute of Frauds: *Sexey vs. Adkison*, *Id.*, 408.

3. *Bill of Exchange—Fraud.*—M., for the purpose of defrauding the General Government out of its revenues, assumed the name of "C.," and in that name purchased goods of W. D. & Co., in Canada, on credit, and smuggled them into the United States at Detroit. From Detroit he shipped them to C. H. & Co., Cincinnati, to be sold on commission; at the same time advising C. H. & Co. by letter, postmarked at Detroit, signed "C.," and requesting them to remit the proceeds. C. H. & Co., having sold the goods, purchased a bill of exchange from the defendants, bankers at Cincinnati, on their correspondent at New York, for the net amount of the proceeds of the goods, and having indorsed it, payable to "C. or order," remitted the bill by mail to Detroit, addressed to "C.," where M. received it; and having indorsed it in blank, thus: "C." delivered it to W. D. & Co. in payment for the goods, from whom the plaintiffs received it in good faith, for full value and before dishonor. Afterward C. H. & Co., under the revenue laws of the United States, were compelled to pay to the General Government the full value of the smuggled goods; and at their instance the bill was dishonored when presented to the drawee for payment. Neither W. D. & Co. nor C. H. & Co. had any knowledge of M., other than in the above transaction, nor that his name of "C." was assumed, nor of his fraudulent practices against the General Government. C. H. & Co. in their correspondence supposed that "C." was the true name of their correspondent. W. D. & Co., at the time they received the bill, had no knowledge of the correspondence between C. H. & Co. and M. In a suit on this bill by the holders against the drawers: *Held*, that the defendants are estopped from denying that the legal title to the bill of exchange is in the plaintiffs, and from setting up as a defense against the plaintiffs the fraud practiced by M. upon C. H. & Co. Judgment below reversed, and judgment entered for plaintiffs and cause remanded, &c.: *Forbes & King vs. Espy, Heidebach & Co.*, 21 Ohio, —.

4. M. delivered to J. logs to saw; J. refusing to re-deliver them, M. brought trover. J. proved that he had been in possession of the land from which the logs had been cut for many years, had exercised



acts of ownership, and had forbidden M. to cut. This would be a good defense.

5. M. gave evidence that he had bought the land from A., and that about the time J. had frequently said that the land belonged to A., that J. was A.'s agent, &c. This would estop J. from claiming the logs.

6. Evidence that A. held the land in trust for J., there being no question raised by the pleadings as to the title of the *locus in quo*, was irrelevant.

7. The question being estoppel as to M., evidence of the relations between A. and J. was irrelevant.

8. Estoppel arises where one misrepresents or by wilful silence misleads another, not having knowledge, into loss, or induces him to do what he would not if he had known the truth, and injury would ensue from permitting the misleading party to allege the truth: *Smith vs. McNeal*, 18 Smith's (68 Penn.) Reports. .

See CORPORATION, 19, 23; INSURANCE, 10.

#### EVIDENCE.

1. *Evidence.*—*Constructive Possession.*—Evidence of permission by a lessor to his lessee to extend his possession beyond the limits of the leased premises, is inadmissible, in order to show constructive possession of the exterior limits in the lessor: *Mason vs. Wolf*, 40 Cal., 216.

2. *Idem.*—In order to show such constructive possession in the lessor, it must appear that the lessee entered by virtue of such license: *Id.*

3. *Incompetent Evidence.*—Where incompetent evidence was admitted by the Court below, against objection, the inference is, that the evidence was considered entitled to some weight in the determination of the issue of fact which was being tried, and it was equally inadmissible whether the case was tried by the Court or before a jury: *Id.*

4. *Evidence.*—*Judgment and Findings in a Former Action.*—The judgment and findings in a former action are inadmissible in evidence in a second action, unless accompanied by the judgment roll: *Id.*

5. *Evidence of Experts.*—When an expert is called by one of the parties to an action, his evidence should be received with great caution by the jury, and should never be allowed except upon subjects which require unusual scientific attainments or peculiar skill: *Grigsby vs. Lake Water Co.*, *Id.*, 396.

6. *Evidence.—Practice on Appeal.*—When an exhibit to a deposition is objected to when produced by the witness, and the objection noted in the deposition, but there is nothing in the records to show that the objection was renewed at the trial, or passed upon by the court below, it can not be raised for the first time on appeal: *Parrott vs. Byers, Id.*, 614.

7. *Evidence.—Subscribing Witness.*—Where a lease having a subscribing witness was admitted in evidence without calling such witness, or accounting for his absence, and the opposing party objected thereto, *held*, error: *Kalmes vs. Gerrish*, 7 Nevada, 31.

8. *Making Parties Witnesses does not change Rules of Evidence.*—The statute making parties competent witnesses does not abrogate the rule of evidence requiring a subscribing witness to a written instrument to be called, or his absence accounted for: *Id.*

9. *Testimony of Party not Best Evidence where Subscribing Witness.*—Where a party desiring to introduce in evidence a written agreement signed by himself with a subscribing witness, took the stand and testified to its execution; but the opposite party objected to its admission on account of the subscribing witness not being called, nor his absence accounted for: *Held*, that such testimony, not being the best evidence, was not sufficient to authorize admission of the paper: *Id.*

10. *Allegations and Proofs.*—The allegation that an owner of land put a person in possession thereof, as his agent, to take care of the premises and to pay the taxes thereon; and that the agent permitted the land to be sold for taxes, which he, fraudulently, failed to pay, as such agent, and bid it in and took a tax deed to himself, with the fraudulent intent thereby to deprive the owner of his land, will not sustain a finding that the agent obtained the tax deed for the sole purpose of reimbursing himself with the fraudulent intent thereby to deprive the owner of his land, will not sustain a finding that the agent obtained the tax deed for the sole purpose of reimbursing himself for moneys by him laid out in paying taxes and improving the land for the owner; nor could the matter of such finding be established under the allegation, as a ground of relief: *Webster vs. Webster*, 55 Ill.

11. *Positive and Negative Testimony.—Of their respective weight.*—In an action against a railroad company to recover for injuries alleged to have resulted from negligence on the part of the servants of the company in respect to ringing the bell on the engine, positive evidence as to that fact is entitled to more weight than negative evidence in relation to it: *C. B. & Q. R. R. Co. vs. Stumps*, 55 Ill., 367.

12. *Negligence in Railroads.--What constitutes.*—A train, consisting of thirteen empty freight cars, was being pushed by an engine along the track on one of the streets in the city of Chicago, at the rate of about four miles an hour; there was a man stationed on the head car for the purpose of watching ahead, and another on the rear car to repeat signals from the former to the engineer; and while the men were attending to their duty in those respects, the train being in motion, a boy about seven years of age undertook to climb up on one of the cars, and, losing his hold, fell under the cars and was seriously hurt. In an action against the company, it was *held*, there was no negligence on their part in the management of the train; it was not incumbent on the company, under such circumstances, to place a guard on every car, to keep persons off: *Id.*

13. While a railroad company is held to a very high degree of care and diligence in operating its road through the public streets of a city, yet the care and caution in this respect are required to be exercised in reference to the proper uses of the streets as a thoroughfare for travel, rather than to safety of persons in wrongfully getting on their cars when running: *Id.*

14. The duty imposed upon the company does not require them to use every absolutely necessary precaution to avoid injury to individuals, or to have employed any particular means which it may appear, after an accident has occurred, but they are only required to use every reasonable precaution, such as would have been adopted by a very prudent person, prior to the accident: *Id.*

15. *Dying declarations.—Advancement.*—Dying declarations of the ancestor are not admissible against the heir for the purpose of showing an advancement. Such declarations are admissible only in such cases of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declaration: *Middleton et al. vs. Middleton et al.*, 31 Iowa.

16. *Advancement.*—But where it is claimed that an advancement was made to an heir by the sale of a farm to him by the ancestor, the declarations of the ancestor, made at about the time of the sale, to the effect that the heir had fully paid him for the farm, are admissible on the part of the heir: *Id.*

17. *Onus probandi.—Instruction.—Error without prejudice.*—While the burden of proof is upon the party claiming it, to show that an advancement was made, the evidence need not be conclusive. The fact may be sufficiently established by a *preponderance* of testimony: *Id.*

18. The giving of an erroneous instruction which under the testimony could have worked no prejudice to the party complaining, will not be regarded as reversible error: *Id.*

19. *Where adverse party is executor.—Husband and wife.*—Section 3982 of the Revision, which prohibits a party from testifying where the adverse party is the executor of a deceased person, does not disqualify the wife of the claimant, and she is competent to give evidence sustaining his claim against the estate: *Shafer vs. Dean*, 29 Iowa, 144; *Wendeling vs. Besser*, 31 Iowa, 248.

20. *Impeachment on matters of opinion.*—An expert, who testifies as to matters of opinion, may be impeached by showing that he has affirmed a different opinion on a former occasion: *Miller vs. Insurance Company*, 31 Iowa, 216.

See APPEAL, 3, 5; CERTIORARI, 3; CRIMINAL LAW, 2; ESTOPPEL, 5, 6, 7; INJURY TO PERSONS, 4, 5; INSURANCE, 17; NUISANCE, 3.

### EXECUTORY CONTRACT.

1. *Executory Contract.—Vendee in Possession.—Ejectment.*—A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title: *Love vs. Watkins*, 40 Cal., 547.

2. *Idem.*—A party who has been permitted to remain in possession under a contract for the purchase of land, for a long period of time, without objection, will be held to be in possession under his contract, although his original entry may not have been under the contract, and no provision as to possession was contained in it: *Id.*

See MARRIED WOMEN, 2.

### EXECUTORS AND ADMINISTRATORS.

1. *Duties of Administrators.—Care and Diligence.*—Whenever an administrator does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damage consequent upon such act or omission: *McNabb vs. Wixom*, 7 Nevada, 163.

2. *Neglect by Administrator to pay over.—Liability for Subsequent Loss.*—If an administrator deposits money of an estate in a bank, and allows it to remain after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled,

to it; and the bank fails and the money is lost, he and his surties are liable therefor: *Id.*

See EVIDENCE, 19.

EXPERT.—See EVIDENCE, 5, 20.

FALSE STATEMENT.—See FRAUD, 1; INSURANCE, 10.

FIRE INSURANCE.—See INSURANCE; CONTRACT, 13.

### FIXTURES.

1. *Fixtures.—Steam Saw-Mill, Boiler, Engine and Machinery.*—Where a steam saw-mill, put upon land for the purpose of sawing up the timber upon it, had its foundation planted in the ground, and the engine, boiler and machinery were attached by bolts, belts, shafts and pipes to the frame work, which was built upon such foundation: *Held*, that such boiler, engine and machinery were fixtures: *Treadway vs. Sharon*, 7 Nevada, 37.

2. *Intention not Material on Question of Fixture or not Fixture.*—The fact that there is but a limited supply of timber on land upon which a steam saw-mill is put, and that it is the intention to remove the mill as soon as the timber is sawed, does not render the boiler, engine and machinery, otherwise fixtures, any the less such: *Id.*

See LANDLORD AND TENANT.

FORECLOSURE.—See MORTGAGE, 1, 2, 4, 5, 8, 9.

FORFEITURE.—See CONSTRUCTION OF CONTRACT, 3, 4; FRAUD, 1.

### FRAUD.

1. *What False Statement Works Forfeiture of Policy.*—In order to work a forfeiture under a clause in a policy of insurance, which declares a forfeiture in case of fraud in the claim made for a loss or false declaring or affirming in support thereof, the false statement must be willfully made with respect to a material matter, and with the purpose of deceiving the insurer: *Gerhauser vs. North British and M. Ins. Co.*, 7 Nevada, 174.

2. *Overestimate of Loss not Conclusive Proof of Fraud.*—There is no rule in insurance cases that a verdict for plaintiff, finding the value of the property lost at only one-half or one-third the valuation given in the statement of loss, will be set aside as of itself evidencing fraud in such statement: *Id.*

See ESTOPPEL, 1, 3; EVIDENCE, 10; INSURANCE, 18; JURISDICTION, 1, 2, 3.

GRANTS.—See CONSTRUCTION, 9.

GUARANTY.—See BILLS AND NOTES, 2.

HOLDER FOR VALUE.—See BILLS AND NOTES, 5, 6, 7.

HUSBAND AND WIFE.—See MARRIED WOMEN; EVIDENCE, 19.

### INJURY TO THE PERSON.

1. *Injury to the Person.—Negligence of Parent.*—Unless there is some unusual exposure to danger, it is not negligence on the part of the parent to allow a child between ten and eleven years of age, ordinarily active and intelligent, to be in the street: *Kurr vs. Parks*, 40 Cal., 188.

2. *Idem.*—That a child five years of age, was permitted to walk in the street, in the day time, within sixty feet of her father's house, where there was no particular reason to apprehend danger, and in a street almost entirely unused, would not as a matter of law, be held evidence of negligence on the part of the parent: *Id.*

3. *Action for Damages for Personal Injury.—Pleading.*—In an action for damages, for injury, caused by defendant's street cars, an allegation by plaintiff that defendant had no lawful right to lay its track, or run its cars on that portion of the street where the injury was done, is not irrelevant or immaterial: *Schierhold vs. North Beach & M. R. R. Co., Id.*, 447.

4. *Damages for Personal Injury.—Evidence.—Custom.*—Evidence that it was the custom of the inhabitants of a locality to allow boys to play in the street, does not tend to prove that such use of the street is lawful: *Id.*

5. *Idem.—Evidence.*—Evidence to prove that the cars of another company were driven down the same grade at less speed than the cars of defendant, is inadmissible: *Id.*

6. *Idem.—Negligence.—Contributory. — Non-suit.*—Negligence is generally an inference from facts and circumstances, which it is the province of the jury to find; and in an action for damages for injury caused by negligence, a non-suit upon the ground of contributory negligence should only be granted, when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must necessarily be set aside: *Id.*

IN PARI DELICTO.—See CHATTELS, 7.

### INSOLVENT.

1. *Discharge in Insolvency.*—A judgment rendered against a defendant subsequent to his discharge in insolvency, in an action com-

menced before the proceedings in insolvency were instituted, is not void on the ground that the judgment was in violation of the restraining order made at the commencement of the proceedings in insolvency, or that the defendant was discharged from all his debts and liabilities, including the debt of the plaintiff prior to the rendition of the judgment: *Rahm vs. Minis*, 40 Cal., 422.

2. *Idem*—*Pleading*.—The defendant is entitled to plead his discharge in insolvency in bar of such action, by supplemental answer. *Id.*

3. *Idem*.—Where a discharge in insolvency is pleaded in bar of an action commenced before the proceedings in insolvency were instituted, a judgment in favor of plaintiff is conclusive that he was entitled to his judgment, notwithstanding the alleged discharge in insolvency. *Id.*

4. *Idem*.—Where such plea is omitted, the judgment is as conclusive upon the defendant as it would be had his defense been accord and satisfaction, payment, etc., which he had neglected to plead. *Id.*

5. *Idem*.—*Practice*.—A defendant, against whom a judgment has been rendered subsequent to his discharge in insolvency who has a complete remedy at law, is not entitled to relief in equity by injunction to restrain the enforcement of the judgment. *Id.*

INSUFFICIENCY.—See APPEAL, 5.

#### INSURANCE.

1. *Insurance*.—*Valid Contract before Actual Delivery of Policy*.—Where a wife made application to the agent of an insurance company for a policy on the life of her husband, and paid fifty dollars in accordance with the company's rules, which was to be applied to the first year's premium, provided the risk should be taken; and in due time a policy was made out and forwarded to the agent for delivery; but before it was delivered the husband died, whereupon the agent, though tendered the balance of the premium, refused to deliver it: *Held*, that there was a valid contract for a policy; that upon the taking of the risk the fifty dollars became entitled to the policy; and that such a contract was as available to sustain an action for the amount of the insurance as if the policy had been delivered: *Cooper vs. Pacific Mutual Life Ins. Co.*, 7 Nevada, 116.

2. *Mistatement of Facts Known to Insurer*.—Where the owner of a brick house, which he had kept insured, found it necessary on account of the settling of one of the walls to re-place it temporarily with wood, which the insurance agent knew; and upon taking out a new policy the owner stated to the agent that the build-



ing was in good repair, but in the same conversation mentioned the fact of the wooden portion still remaining: *Held*, no such misrepresentation as would vitiate the policy: *Gerhauser vs. North British and M. Ins. Co., Id.*, 174.

3. *Depreciation of Property Insured.*—Where furniture was insured at its full value with the knowledge of the insurer, and was kept insured for the same amount for a number of years, while by ordinary wear and tear and the condition of the building where it was, and which was known to the insurer, it depreciated in value: *Held*, that the mere fact that such furniture was worth less than the amount for which it was insured the last time did not vitiate the policy. *Id.*

4. *Description of Building in Policy not a Warranty.*—Where a policy of insurance described the building insured as a “brick building,” and it appeared that on account of the settling of one of the walls it was found necessary to put in temporarily a wooden substitution, which the insurer knew: *Held*, that the description in the policy was not a warranty that the building was entirely of brick. *Id.*

5. *Misdescription Used by Insurance Agent.*—Where on account of the settling of one of the walls of a brick building, it was found necessary to replace a portion of it temporarily with wood; and while in that condition it was insured, with full knowledge of its condition, as a “brick building:” *Held*, that notwithstanding the wooden portion of the building was not incorrectly called a brick building; but whether it was not, the insurer could not take advantage of a misdescription knowingly used by its own agent, who drew the policy. *Id.*

6. *Insurance — What Facts Must be Disclosed.*—Where the jury in an insurance case, was instructed that the mere failure of the insured to disclose material facts known to the insurer or unknown to the insured, would not prevent a recovery, and such instruction was pertinent to the testimony: *Held*, no error. *Id.*

7. *Considerations pertinent to question of Misrepresentation.*—Where in an insurance case, the effect of an instruction, asked by defendant in reference to alleged false representations by the insured, would have been to prevent the jury from drawing a conclusion from the whole conversation whether or not the insurer was sufficiently informed as to the true condition of the property: *Held*, properly refused. *Id.*

8. *Agreement as to What Shall be Material Representation.*—Parties to a contract of insurance may decide for themselves what facts or representations shall be deemed material, either by converting the representations into a warranty or stipulating as to their materiality;

and when they have so agreed, the agreement precludes all inquiry upon the subject. *Id.*

9. *Notice to Agent*.—Notice to an agent of a life insurance company having authority to solicit, make out and forward applications for insurance, to deliver to the assured policies when returned, and to collect and transmit premiums, will operate as notice to the company; and it will be bound by acts then done by him in respect to the business he is transacting: *Miller vs. The Mutual Benefit Life Insurance Co.*, 31 Iowa, 216.

10. *Estoppel—False Statement*.—An untrue or fraudulent statement on the part of the applicant, of a fact material to the risk, will not prevent a recovery against the company if it or its agent, authorized as above stated, was informed of and knew the truth in regard to such fact when it received the application and premium and issued the policy: *Id.*

11. *Matters of Warranty and Representation*.—Matters of warranty constitute a part of the contract, and it is necessary that they should be exactly and literally complied with; but matters of representation are but collateral to the contract; and it is sufficient if they are substantially complied with. The distinction between warranties and representations pointed out by Day, Ch. J.: *Id.*

12. Warranties will not be created nor extended by construction. They must arise from the fair interpretation and clear intendment of the language used: *Id.*

13. *Nature of Application*.—The application is, in itself, merely collateral to the contract of insurance, and its statements are to be classified and construed as representations, unless, by force of a reference in the policy, they are converted into warranties, and the purpose is clearly manifest, from the papers thus connected, that the whole shall form one entire contract: *Id.*

14. In order to constitute words of reference, contained in an application, into a warranty, they must be such as, in legal effect, make it a part of the policy: *Id.*

15. *Rule Applied*.—In the present case, which was an action on a policy based on an application for insurance on the life of another, there were five separate papers connected with the application, viz.: one headed "particulars required from persons proposing to effect insurance on lives in this company;" another, "questions to be answered by the physician of the party applying for insurance;" another, "questions to be answered by the friend of the party applying for insurance;" another, "questions to be answered by the agent, if the ap-

plicant is not previously known to him;" and, lastly, one headed, "declaration to be made and signed by the person proposing to make insurance on the life of another." The policy contained the following reference: "It is understood and agreed by the assured to be the true intent and meaning hereof, that, if the declaration made by or for the assured, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void:" *Held*, that the statements contained in the *declaration* could alone be regarded as warranties, and that the statements of the person on whose life the insurance was effected were to be regarded as mere representations: *Id.*

16. *Materiality of Representations—Province of Jury.*—While it is within the proper province of the jury to determine whether the statements made in an application for insurance are substantially, or, in every material respect true, it is not their province to determine the materiality of alleged misstatements contained in such application: *Id.*

17. *Evidence—Medical Testimony as to Cause of Death.*—The opinion of a physician is competent evidence as to the cause of death of a person whose life is insured; but the weight of such opinion is a question for the jury: *Id.*

18. *Fraud—Statements to be Considered.* In determining the question of fraud regarding representations in respect to the health and habits of the person on whose life insurance was sought to be effected, not only the answers or statements of such person, but those of his physician and of his friend, should be considered by the jury: *Id.*

See FRAUD, 1, 2.

INTENTION.—See FIXTURES, 2.

#### INTERPLEADER.

##### *Verdict and Judgment—Lien—Bond.*

1. A verdict and judgment in an issue under a sheriff's interpleader is a judicial proceeding, which is final and conclusive on the parties and their privies as to the questions tried and decided.

2. Privity in such cases denotes mutual or successive relationship to the same rights of property.

3. Funk levied on goods on an execution against Austin; Corry claimed the ownership, and they were delivered to him under a sheriff's interpleader upon his giving bond, &c. They were levied on and sold to Bain on an execution against Corry. The issue be-

tween Funk and Corry was decided against Corry; the sheriff, under Funk's execution, took the same goods from Bain, and the court discharged a rule for an interpleader issue on Bain's claim of ownership. Bain sued the sheriff in trespass: *Held*, that he was concluded by the verdict against Corry.

4. Austin not being a party to the issue, neither he nor his creditors or assignees were bound by it.

5. The interpleader bond being for the forthcoming of the goods to answer the execution, &c., should the issue be decided against the claimant, they are to be sold under that execution or a venditioni following it.

6. The production of the same goods, although depreciated, if without the fault of the claimant, would discharge him.

7. If by the act of the law the performance of the condition has become impossible, the bond is saved.

8. An execution creditor can not lose his lien or priority unless by his fault, without having a remedy against the sheriff and on his official bond.

9. A *fi. fa.* having a lien on goods being stayed by a judicial order, does not lose its priority to subsequent executions, though there was no stipulation in the order of stay that it should not lose its lien.

10. It is proper practice to make stipulation for the continuance of the lien: *Bain vs. Lyle*, 18 Smith's (68 Penn.) Reports.

JUDGMENT.—See APPEAL, 1, 4; EVIDENCE, 4; INSOLVENT, 1, 3, 4, 5; INTERPLEADER, 1; JURISDICTION, 2, 3.

#### JUROR.

1. *Juror—Competency of.*—Where a juror in a criminal proceeding, upon examination as to his qualification to try the case, states that he has formed a fixed decided opinion in regard to the guilt or innocence of the defendant, a subsequent statement by him on cross-examination, that his opinion is not an unqualified one, and that he could try the case and render a verdict according to the evidence, notwithstanding any previously formed opinion, will not remove his disability as a juror: *People vs. Weil*, 40 Cal., 268.

2. *Idem—Challenge of.*—Where a challenge for cause was erroneously disallowed by the court, and the juror then peremptorily challenged, if the defendant exhausted the number of peremptory challenges to which he was entitled before the jury was completed, the

practical result of the erroneous disallowance of defendant's challenge for cause, was to contract the number of peremptory challenges to which he was entitled, and may have been seriously prejudicial to the defendant: *Id.*

3. *Juror—Misconduct of.*—The mere disclosure by a juror of a verdict already agreed upon, sealed up and delivered to the clerk by the jury, is reprehensible, but in the absence of any damage caused thereby to either party to the action, or of any fraudulent conduct on the part of the juror, it is not of itself, sufficient to invalidate the verdict: *Ingersoll vs. Truebody, Id.*, 603.

#### JURISDICTION.

1. *Fraud in Obtaining.*—If a person residing in one jurisdiction, be induced under false pretences or representations, to come into another, for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained: *Dunlap & Co. vs. Coily*, 31 Iowa, 260.

2. *Defense—Judgment.*—Such fraud in obtaining jurisdiction of the person of defendant will vitiate the judgment: *Id.*

3. In a case of this kind it is not incumbent on the defendant to appear before the jurisdiction where the action was commenced and set up the facts showing the fraud; but he may, having failed to appear in the original action, plead them in a subsequent action on the judgment, commenced in the jurisdiction where he resides: *Id.*

#### LANDLORD AND TENANT.

*Principle of Tenant's Right to Remove Fixtures.*—The law indulges a tenant with the right of removing fixtures during his term, not out of any regard to his intention, but by way of exception to a rule which would otherwise work hardship or retard improvement: *Treadway vs. Sharon*, 7 Nevada, 37.

LEASE.—See ADMINISTRATION; CONTRACT, 1.

LEGAL TITLE.—See DEED AS A MORTGAGE, 3; MORTGAGE, 1, 6.

LEGISLATIVE INTENT.—See CONSTRUCTION, 1, 5, 6.

LIABILITY.—See AGENT, 2; AGENCY, 1; ASSAULT, 2; BILLS AND NOTES, 2; EXECUTOR AND ADMINISTRATOR, 2.

LIEN.—See INTERPLEADER, 9, 10; MORTGAGE, 11, 13; UNITED STATES, 1, 2, 4, 5.

LIQUIDATED DAMAGES.—See DAMAGES, 3.

## MARRIED WOMAN.

1. *Married Woman—Contract by, prior to Marriage—Specific Performance.*—When a married woman has, prior to her marriage, entered into a contract which is binding upon her, a specific performance may be decreed, notwithstanding her subsequent marriage: *Love vs. Watkins*, 40 Cal., 547.

2. *Idem—Separate Property—Executory Contract.*—An executory contract for the sale of the wife's separate property, executed by the husband and wife in the mode prescribed by the statute defining the rights of husband and wife, is valid and binding on the wife, and may be enforced by a decree of specific performance: *Id.*

MASTER'S REPORT.—See CHANCERY.

MISDESCRIPTION.—See INSURANCE, 5.

MISNOMER.—See CORPORATION, 18.

MISREPRESENTATION.—See CONTRACT, 12; INSURANCE, 7.

MISSTATEMENT.—See INSURANCE, 2.

## MORTGAGE.

1. *Dower.*—The doctrine is well settled that a widow, who, during coverture, joined her husband in a mortgage of realty, whereof he had inheritable seizin, is dowable in equity of the surplus moneys arising from a judicial sale under a decree of foreclosure against her thereon, which may remain after satisfying the mortgage debt and the proper costs of foreclosure; but she is dowable of the surplus only, and not of the entire proceeds, to be satisfied out of the surplus; her right being extinguished by the sale to the extent that the proceeds are appropriated to the satisfaction of the mortgage.

2. *Contribution.*—Where a husband, with whom his wife joined in a mortgage of realty, in which she had an inchoate right of dower, disposes of his equity of redemption therein by deed in which she does not join, and dies after a judicial sale of the mortgage premises under a decree of foreclosure against them, she is dowable of the surplus moneys resulting therefrom after satisfying the mortgage debt and costs to the extent that her right can be equitably discharged from the portion of such surplus, which shall not previous to its assertion have passed by final decree from the Chancellor's control; but if the equity of redemption be held by several, to some of whom shall have been distributed their respective portions of the surplus

on final decree, without objection interposed, or assertion of right by her, they will not be required to refund, nor will contribution be enforced against the interests of others which shall not have been so distributed: *The State Bank of Ohio vs. Otho Hinton and wife, et al.*, 21 Ohio.

3. *Mortgage.—Legal Title.*—It is definitely settled in this State, that a mortgage does not convey the title to the mortgaged premises, but only creates a lien thereon for the security of the mortgage debt: *Carpentier vs. Brenham*, 40 Cal., 221.

4. *Idem.—Senior and Junior Mortgages.—Effect of Foreclosure.*—Although the foreclosure of a first mortgage, to which the junior mortgagee was not a party, does not affect the rights of the latter, yet such a foreclosure is valid between the holder of the first mortgage and the mortgagor; and the purchaser at the foreclosure sale acquires the legal estate of the mortgagor, subject only to the lien of the junior mortgagee: *Id.*

5. *Idem.—Foreclosure.—Parties.*—Subsequent incumbrancers are not necessary, though proper, parties to an action to foreclose a mortgage: *Id.*

6. *Idem.—Equity.—Legal Title and Mortgagees' Interest.*—Equity will keep the legal title and the mortgagee's interest, although held by the same person, separate, whenever necessary for the full protection of such person's just rights: *Id.*

7. *Idem.—First Mortgagee.*—A first mortgagee who obtains a valid decree of foreclosure, and becomes the purchaser at the foreclosure sale, acquires the legal title freed of the first mortgage as against the mortgagor and all persons brought into court, while as against a junior mortgagee, who was not a party to the foreclosure suit, he holds the legal title subject to both mortgages, and this, although he still retains his rights as first mortgagee: *Id.*

8. *Idem.—Subsequent Mortgagee.*—A subsequent mortgagee has no estate in the land itself nor any lien upon the land, except subject to the prior lien; that is, he has a right to be paid out of the excess; which is, in effect, a right to redeem, and incidentally—if made a party to a foreclosure suit—a right to defend by pleading the Statute of Limitations, or the invalidity in whole or in part, of the plaintiff's claim, or that it is paid: *Id.*

9. *Idem.*—Whenever a subsequent mortgagee files a bill to redeem the former mortgage, or to redeem the former and to foreclose his own, he may allege and show that the claim of the prior mortgagee



has been exaggerated, or any other kindred fact which will increase the fund: *Id.*

10. *Idem.*—No decree in a proceeding to which he was not made a party, can deprive a mortgagee of the right to relief, by showing that an apparent prior incumbrance is fraudulent or not supported by any consideration: *Id.*

11. *Idem.*—A junior mortgagee possesses the right to extinguish the senior incumbrance; and, by whatever mode he may elect to exercise this right, it operates as a satisfaction of the claim of the prior mortgagee, and a release from his lien: *Id.*

12. A deed was made to a wife for property purchased by her whilst her husband was in the army; part of the purchase money was paid by money borrowed from Bower, for which a judgment was recovered against the husband. The land was sold under a subsequent mortgage given by husband and wife. In distributing the balance of the proceeds, there being no clear evidence that the property had been purchased with the separate funds of the wife, it was to be treated as the husband's property. Per Woodward, P. J., adopted by Supreme Court.

13. The husband and wife subsequently executed a mortgage which could not claim the exemption, and the property was sold under it. *Held*, that this did not waive the exemption as to prior liens: *Id.*

14. A waiver in favor of a junior lien, leaves the property to be apportioned as if no exemption existed: *Id.*

15. As against a mortgagee, the rights of the debtor are gone; but the execution of a mortgage does not amount to a waiver of exemption as against general judgment creditors: *Bower's Appeal*, 18 Smith's (68 Penn.) Reports.

See CONSTRUCTION OF CONTRACT, 3; CORPORATION, 24; RAILROAD, 2; WILL, 2, 3.

## MUNICIPAL CORPORATION.

### *Street Improvements.—Sewerage.*

1. As a general rule, a municipal corporation is not liable for injuries to buildings on lots abutting upon streets and alleys, resulting from the improvement on such streets or alleys, or from their appropriation to a public use, provided its officers and agents in making

such improvement or appropriation, act within the scope of their authority, and without negligence or malice.

2. If, however, it be shown that the municipal authorities, before the construction of such buildings, had so improved or appropriated the street or alley to public uses, as to indicate fairly and reasonably that no future change or other use would be required by the city or village, and the abutting proprietor, relying upon such corporate acts as a final decision as to the wants of the public; improve his lot in a manner suitable to the established use, and afterwards his improvements are injured by a change, or by the appropriation of the street or alley to other uses, the corporation will be liable for damages resulting therefrom.

3. But if the nature and extent of the improvements and uses of the street or alley have not been so indicated or defined by the city or village, abutting proprietors must, at their own peril, improve their lots with reference to such future uses or changes in the streets as may be made and adopted by the city or village while acting within the scope of its municipal authority.

4. Under the laws of this State, sewerage is one of the legitimate uses to which the public streets and alleys of the city of Cincinnati may be appropriated by its municipal authorities. Judgment reversed, and cause remanded: *The City of Cincinnati vs. Groves J. Penny*, 21 Ohio State Reports.

MUTUAL MISUNDERSTANDING.—See CONTRACT, 9.

NAVIGABLE STREAM.—See BOUNDARY, 1. 3.

NEGLIGENCE.—See DAMAGES, 2; EVIDENCE, 12, 13, 14; EXECUTOR AND ADMINISTRATOR, 2; INJURY TO PERSON, 1, 2, 6.

#### NEGOTIABLE INSTRUMENTS.

1. *Negotiable Instruments.*—*Bona fide holder without Notice.*—As a general rule, a *bona fide* holder of a negotiable instrument for a valuable consideration, without any notice of facts which tend to impeach its validity, as between the antecedent parties thereto, if he takes it by transfer before the same is overdue or presumptively dishonored, holds the title unaffected by these facts, and may recover thereon, although as between such antecedent parties, the legal validity of the instrument, or the title thereto, may be successfully impeached: *Himmelman vs. Hoteling*, 40 Cal., 111.

2. *Idem.*—*Presumptive Dishonor.*—A promissory note payable on

demand, a bank check or certificate of deposit, are not presumptively dishonored until the lapse of a reasonable time after payment thereof may be legally demanded: *Id.*

3. *Idem.*—*Reasonable time.*—What shall be deemed a reasonable time, is a question of law for the court: *Id.*

4. *Idem.*—Where the drawer and drawee of a bank check reside in the same city or town, a demand made during the business hours of the day succeeding that on which payment might have been first legally demanded, has uniformly been considered within such reasonable time: *Id.*

5. *Idem.*—*Dishonor.*—Although a check may be actually dishonored by a refusal to pay on a proper demand being made before presumptive dishonor, yet, to charge the check with the infirmity of dishonor in the hands of a third party, to whom it had been transferred for a valuable consideration before the expiration of the reasonable time which must elapse before presumptive dishonor, notice of the previous actual dishonor must be brought home to him, or he holds it free from the taint of dishonor: *Id.*

NEW TRIAL.—See APPEAL, 1, 5.

NON-PERFORMANCE.—See WILL, 7.

NON-SUIT.—See INJURY TO PERSON, 6.

NOTICE.—See BILLS AND NOTES, 2, CORPORATION, 9; INSURANCE, 9; NEGOTIABLE INSTRUMENTS, 1, 5.

#### NUISANCE.

1. *Nuisance, Public or Private.*—*Damages.*—The plaintiff, in an action for nuisance, can not recover damages for injuries which affect the public generally; but if he has suffered damages peculiar to himself, it becomes, to that extent, a private nuisance for which he may recover: *Grigsby vs. Clear Lake Water Co.*, 40 Cal., 396.

2. *Nuisance.*—*Continuance of, Notice.*—A party who continues a nuisance, but is not the original creator of it, is entitled to notice that it is a nuisance, and a request must be made that it may be abated, before an action will lie for that purpose, unless it appear that he had knowledge of its hurtful character; where the extent of the nuisance is increased by such party, the rule is otherwise: *Id.*

3. *Idem.*—*Evidence.*—Evidence tending to show that the nuisance was produced by natural cause, is admissible: *Id.*

ONUS PROBANDI.—See EVIDENCE, 17.

ORDER.

1. *Order of Judge not Filed Within his Term of Office.*—Where a district judge on the last day of his term of office made an order overruling a demurrer, which, however, was not filed until a week afterwards: *Held*, no valid order, and that the action of his successor in setting it aside, and hearing the issue anew, was proper: *Schultz vs. Winter*, 7 Nevada, 130.

2. *Orders Made in Vacation not Valid till Entered.*—An order of a judge upon an issue of law, if it be a final judgment, may be entered in term or vacation; but such an order in vacation can have no vitality until it be at least delivered to the clerk for filing. *Id.*

PAROL.—See CONTRACT FOR SALE OF LANDS, 1, 2.

PAROL TRUST.

1. The identical matter of an exception should be in the assignment of error; it is not enough that it appear in the bill of exceptions.

2. Judgments were recovered against J. which were assigned to A., and under them J.'s land was sold to A.; J. retained possession and made improvements. Judgments were recovered against A., and the land was sold to T. In ejectment by T. against J., it might be proved in defense, that the judgments against him had been purchased by A. with J.'s money to protect J.'s land for him; that A. so admitted after the sheriff's sale; and that he had conveyed to J. by deed not recorded, with other facts tending to show J.'s ownership of the land and T.'s knowledge, before his judgment against A.

3. These facts did not constitute a parol sale of the land by A. to J., but a trust by parol, the title in the trustee and the *cestui que trust* in possession.

4. T. having been informed of this, took no better title by the sheriff's sale under his judgment against A. than A. had.

5. The limitation under which a parol trust can be enforced, does not apply when the *cestui que trust* is in possession: *Smith vs. Tome*, (68 Penn.) *Smith's Reports*, 18.

PARTIES.—See MORTGAGE, 5.

PENALTY.—See DAMAGES, 3.

PLEADING.—See INJURY TO PERSON, 3; INSOLVENT, 2, 3, 4.

POINTS OF LAW.—See APPEAL, 3.

POLICY OF INSURANCE.—See INSURANCE; CONSTRUCTION, 7, 8.  
CONTRACT, 12.

POSSESSION.—See EXECUTORY CONTRACT, 1, 2; CORPORATION, 22.

POWERS.—See AGENT, 1; AGENCY, 1, 2; CORPORATION, 2, 10, 24.

PRACTICE.—See CORPORATION, 21; INSOLVENT, 5.

PROOF.—See EVIDENCE, 10.

PROVINCE OF JURY.—See INSURANCE, 16.

PUBLIC POLICY.—See CONTRACT, 8.

### RAILROAD.

#### *Bondholder—Mortgage—Trustee.*

1. In distributing the proceeds of a sale of a railroad, &c., the master is limited to *distributing* the fund to the parties entitled under the decree; he can not go behind the decree to inquire whether the parties claiming are entitled to a position different from that which the decree assigns them.

2. There were a first and second mortgage on a railroad. The trustee under the first filed a bill to foreclose and make the trustee under the second, a party. A decree having been made postponing the second, a bondholder under it alleging error should ask for a review or a re-hearing.

3. Bondholders under such mortgages are not parties; the true party is the trustee, and he is to be summoned to defend the interest of those claiming under the mortgage.

4. The bondholders are privies, and may defend *pro interesse suo*, but their rights are affected by a decree against the trustee.

5. The bondholder is not as a creditor, claiming a right to attack the decree of an opposing creditor for collusion or fraud between the plaintiff and defendant, but is affected by the decree against his own trustee.

6. In the distribution it was competent for one to claim that he owned bonds entitled to a dividend, which were presented and claimed by another.

7. Souder's Appeal, 7 P. F. Smith, 498, recognized: *McElrath et al. vs. Railroad Co.*, Chapman's Appeal, 18 Smith's (68 Penn.) Reports.

RATIFICATION.—See CONTRACT, 10, 11.

RECEIPT.—See ACCORD AND SATISFACTION.

REDEMPTION.—See CORPORATION, 8; DEED AS A MORTGAGE, 4.

RESTRAINT OF TRADE.—See CONTRACT, 3.

REVERSAL.—See APPEAL, 2.

REVIEW.—See CERTIORARI, 3.

RIPARIAN RIGHT.—See WATER RIGHTS.

### SALE AND DELIVERY.

1. *When Title does not Pass.*—Cloths in progress of manufacture were purchased by the plaintiff of a manufacturing corporation and left to be finished, subject to a right to take them away at his pleasure: *Held*, that no title to these cloths passed to the plaintiff as against creditors: *Hall vs. Gaylor*, 37 Conn., 550.

2. *When Original Sale was Considered Completed.*—Several weeks after the sale the cloths in question were, by order of the plaintiff, placed on board a steamboat to be conveyed to the city of New York. Before the steamboat left, the president of the company, without authority from the plaintiff, ordered them to be carried back to the mill, and they were so returned, and immediately after were attached by creditors of the corporation, and were held under attachment, until, soon after, the corporation went into insolvency: *Held*, that the original sale was completed and made valid by the subsequent delivery on board the boat, and that the rights of the plaintiff could not be affected by the acts of the company in re-taking the goods. *Id.*

SEPARATE PROPERTY.—See MARRIED WOMEN, 2; MORTGAGE, 12.

SEVERAL OBLIGATION.—See CONTRACT, 2.

SPECIAL FRANCHISE.—See CORPORATION, 14; STOCKHOLDERS, 8, 15, 17.

SPECIFIC PERFORMANCE.—See CONTRACT, 1; MARRIED WOMEN, 1, 2.

STATUTES.—See CONSTRUCTION, 1, 2, 3, 4.

STATUTE OF FRAUDS.—See ESTOPPEL, 2.

STATUTE OF LIMITATIONS.—See CONSTABLES; DEED AS A MORTGAGE, 1, 2; MORTGAGE, 8.

STREETS.—See CORPORATION, 23.

SUBSCRIBING WITNESS.—See EVIDENCE, 8, 9.

SUFFICIENCY.—See BILLS AND NOTES, 1.

SURETIES.—See AGENCY, 1.

TAX DEED.—See EVIDENCE, 10.

### TENDER.

1. *Plea of Tender of Smaller Sum not an Admission.*—Where, in an action by attorneys against a county, to recover \$5,000 for services performed for it under an unauthorized contract made by the district attorney, defendant denied any employment, and also pleaded that the services were worth only \$400, which it tendered and brought into court: *Held*, that, though under the old common law practice, such plea of tender might have carried with it an implied admission of the employment, it was not so under the practice act, which allows a defendant to plead as many defenses as he may have, and provides that all the allegations of a pleading shall be liberally construed with a view to substantial justice: *Clarke vs. Lion County*, 7 Nevada, 75.

2. *Tender of Smaller Sum not an Admission of Indebtedness.*—A tender of a smaller sum than that claimed is not a necessary admission that any sum is legally due. *Id.*

See VENDOR AND VENDEE, 1, 2.

TESTIMONY.—See CRIMINAL LAW, 3; EVIDENCE, 9, 11.

TRANSFER.—See BILLS AND NOTES, 5, 6; CORPORATION, 20.

TRUST.—See CORPORATION, 5, 6, 7.

### TRUST FOR CHARITABLE OR RELIGIOUS PURPOSES.

1. *Sale of Property held in Trust for Charitable or Religious Purposes.*—A court of Equity has jurisdiction to decree a sale of property held in trust for charitable or religious purposes when, in its opinion, the objects of the trust would be more effectually carried out by such sale: *Almany vs. Wensinger*, 40 Cal., 288.

2. *Item.—Bond of Trustee.*—A decree of sale of property held in trust for religious or charitable purposes, should require from the trustee a bond, with sufficient security to be approved by the court, for the proper application of the proceeds of the sale to the purposes of the trust, according to the directions of the decree, and reserving the authority of the court upon proper showing to require additional



security, or to appoint another trustee if circumstances make it necessary: *Id.*

3. *Idem.*—*Costs of Litigation.*—The costs of litigation, including reasonable fees to counsel, in a proceeding for the sale of property held in trust for religious or charitable purposes, are a proper charge on the trust fund, and should be allowed by the court: *Id.*

#### UNITED STATES.

1. *Lien.*—The United States has a lien upon the distillery, fixtures, etc., for taxes on distilled spirits when such property is sold on execution against the distiller.

2. *Idem.*—The property is not sold *subject* to the lien, but the United States taxes are to be first paid from the proceeds.

3. *Idem.*—The sale being under process from a State court, that court will distribute the proceeds and recognize the priority of the United States claim.

4. *Idem.*—The lien of the United States is superior to the claim of the landlord on the proceeds for rent.

5. *Idem.*—The laws of the United States are supreme on all subjects to which the legislative power of Congress extends: *Dungan's Appeal*; *Blake's Appeal*; 18 Smith's (68 Penn.) Reports.

#### VENDOR AND VENDEE.

1. Where a contract for the sale of real estate stipulates that, upon the failure of the vendee to pay the sums stipulated as they fall due, or the taxes thereafter accruing, the contract shall be forfeited, and time is stipulated to be of the essence of the contract, the contract will not be held forfeited by the failure of the vendee to pay the tax before they become delinquent, and the payment of the same by the vendor, if the vendee soon thereafter, tender to him the amount thus paid, with interest: *McClartey vs. Gokey et al.*, 31 Iowa, 505.

2. *Time of tender.* The tender by the vendee of a payment in the evening after sundown, of the day on which it falls due, is sufficient under such a contract: *Id.*

VERBAL AUTHORITY.—See AGENT, 1.

WAREHOUSEMAN.—See BAILMENT.

WARRANTY.—See CHATTELS, 1, 4; INSURANCE, 4, 8, 11, 12.

#### WATER RIGHTS.

1. *Right of Land Owner to Natural Flow of Water through it.*—The owner of land over which a stream of water naturally flows, has

a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, when he chooses, as will not damage others located on the same stream and entitled to equal rights with himself: *Vansickle vs. Haines*, 7 Nevada, 249.

2. *Rights of Riparian Proprietors on Non-Navigable Streams.*—The common law rule as to running water, allows all riparian proprietors to use it in any manner not incompatible with the rights of others; so that no one can absolutely divert all the water of a stream, but must use it in such a manner as not to injure those below him: *Id.*

3. *Use of Water percolating into one's own Soil, not Actionable.*—Where plaintiffs appropriated, possessed and used a spring of running water upon land which they occupied; and defendants dug a well upon adjoining land occupied by them; and the spring dried up after the digging of the well, but there was no visible connection between the well and the spring—the flow of water into defendants' land being by percolation: *Held*, that plaintiffs had no cause of action against defendants for damages, or for an injunction: *Mosier vs. Caldwell*, 7 Nevada, 363.

4. *Right of owner of Land to dig for Water in it.*—A person may lawfully dig a well upon his own land, though thereby he destroy the subterranean, undefined sources of his neighbor's spring: *Id.*

5. *Percolating Water a part of the Soil.*—Water percolating through the soil is not, and can not be, distinguished from the soil itself; and of such water, the proprietor of the soil has the free and absolute use, so that he does not directly invade that of his neighbor, or, consequently, injure his perceptible and clearly defined rights: *Id.*

## WILL.

### *Mortgage—Cestui que trust.*

1. Hance, seised of real estate devised it to Edmunds, in trust to pay the rents, etc., to his wife for life, and on her death to convey it to Garretson (a married woman) and Laming, in fee. On the death of his wife, the trust ceased.

2. The property was subject to a mortgage. During the life of the widow, Laming conveyed his interest to Westcott. The mortgagee sued out the mortgage. Westcott purchased the mortgage; the property was sold under it, and purchased by himself. *Held*, that

the purchase of the mortgage and land was for the benefit of Mrs. Garretson, his co-tenant, as well as of himself.

3. The will authorized Edmunds to mortgage the property during the wife's life, "for the sole purpose of paying off the mortgage now held against me." *Held*, it was the duty of Westcott to notify Edmunds to make a loan under the will to take up the mortgage; notice to the *cestui que trust* was not sufficient.

4. Mrs. Garretson being a married woman, was not in a condition to be forced into an election.

5. The property was sold February, 1866; the widow died November, 1867. Mrs. Garretson tendered her share of the purchase money, and demanded a conveyance from Westcott, in February, 1868. *Held*, that this was not unreasonable delay.

6. After the death of the widow, a bill was filed in the name of the trustee as such, against Westcott for a conveyance of the moiety and an account. *Held*, that the trustee was not then a proper party, but the bill being for the use of Mrs. Garretson, was amendable by striking out the trustee's name in the Supreme Court: *Edmund's Appeal, Hance's Estate*, 18 Smith's (68 Penn.) Reports.

*Conditions in.—Non performance of Condition.*

7. A clause in a will was in substantially the following form: "I give and bequeath to my son, Elisha J., my real estate, (describing it,) during his natural life; and after his decease, to descend to his heirs; provided, however, that the said Elisha J., shall provide a home for his sister, Oriel, till her marriage, and then to give her an outfit equal to what her sisters have received at their marriage; provided, however, that if the said Elisha J. does not accept of the provisions of this will within eighteen months from the date hereof, then said property to revert to his sister, Oriel." *Held*, while, by the terms of the will, an estate was devised over to the daughter upon the non-compliance of the second proviso or condition by the son, that the first condition did not thus operate as a limitation upon the estate devised to him and his heirs, and therefore, that a breach or non-performance of such condition did not have the effect of divesting his title under the will, but merely operated as a trust or charge upon the estate for its performance: *Woodward vs. Walling*, 31 Iowa, 533.

WITNESS.—See EVIDENCE, 8, 9.

*Digest of Tennessee Decisions, delivered by the Supreme Court at Jackson. April Term, 1872.*

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ACCOUNT.

Profert need not be made of an account coming from another State or county: *App vs. Lieman*, 55.

ACTION.

1. *Party*.—A suit against “the captain and master of the steamboat M. H.,” without naming him, is fatally defective, and a judgment on such proceeding in the same form, is void: *C. & M. of M., Hamilton vs. Paschal*, 34.

2. A suit brought in the name of A., for the use of B., on a note indorsed by A. to B., for collection by B., was amended by striking out the words for the use of B.: held proper, and that the holder might strike out the indorsement to B., and recover: *Southworth vs. Thompson*, 10.

3. An executrix, being sole devisee of an estate, sues in her character of executrix for rent which would properly belong to her as devisee. No objection being taken until after verdict, to the character in which the plaintiff sued: held no ground for a new trial: *Clayton vs. McKinney*, 107.

4. No proof being made whether land was held in fee or for years, after verdict, it will be presumed that the estate was such as will sustain the verdict: *Id.*

ADMINISTRATION.

1. An appointment of an administrator, in the Chancery Court, ought to be upon an original bill filed for that purpose. But if it be by amended and supplemental bill in a cause pending, it is not void. It seems it is irregular, perhaps erroneous: *Barry vs. Frazier*, 12.

2. The administrator in such case, by appointment and qualification, becomes a party to the proceeding in court: *Id.*

3. It is too late, after trial and verdict on an issue affecting the merits of a suit, to object that an administrator has failed to produce or make profert of his letters: *Walsh vs. Walsh*, 16.

4. An administrator from another State can sue in his own name in this State, on a contract made with him as administrator: *Id.*

5. If necessary to maintain a suit, an official description will be treated as a *descriptio personæ*: *Id.*

#### ADMINISTRATION.—SETTLEMENT.

1. *County Court*.—An *ex parte* statement of an administrator to the County Court, is not a proper basis for the action of the court. The action must be taken upon report of the County Court Clerk, made in accordance with the requirements of Sections 2298, 2302, of Code, upon notice to the parties interested: *Cothem, ex parte*, 156..

2. An administrator can not be relieved of a sum of money lost by failure of a bank in which it was deposited, upon an *ex parte* petition and exhibit of his accounts: *Id.*

#### AGENT.—NOTICE.

1. Notice to the agent of a bank is notice to the bank: *Tagg vs. Ten. Nat. Bank*, 106.

2. A charge that if the President of a Bank obtained knowledge of the defect of a paper in his individual capacity; or if he, acting for himself and not for the bank, was a party to the fraudulent transaction out of which the paper arose, neither his knowledge or the fraud would bind the bank—is erroneous: *Id.*

3. If the maker concurred in the fraud, and the bank had only constructive notice, the maker would be bound: *Id.*

#### AGENCY.

1. A book-keeper left in Memphis by a firm of commission merchants, with directions to wind up their business, at the request of a former customer of the firm collected money, and gave the receipt in the name of the firm, for which he did not account. *Held*, that the firm was not liable for his act: *Jones vs. Harris*, 122.

2. A sheriff or clerk, in the collection of money on judgment or execution, acts as the officer of the law, not as the agent of the parties: *Burford vs. Bulletin Co.*, 128.

#### AMENDMENT.—STATUTE OF LIMITATIONS.

1. Where a suit is brought by a widow for the killing of her husband, within the time prescribed by the Statute, and the suit is afterwards changed to the name of the administrator, the time of the statute is to be computed to the time of making the amendment: *Flatley vs. M. & C. R. R. Co.*, 112.

2. On an amendment substituting parties for others who could not

maintain the suit, the Statute of Limitations runs to the time of the amendment: *Id.*

3. Cases reviewed: *Nance vs. Thompson*, 1 Sneed, 321; *Crofford vs. Cothorn*, 2 Sneed, 492.

#### APPEAL.

An appeal from specific matters in a decree, opens the case as to such matters only as are appealed from: *Morrison vs. Garth*, 13.

#### ASSIGNMENT.—NOTICE.

1. Notice of an assignment of a non-negotiable chose in action, is necessary to pass title as against a garnishment: *Clodfeller vs. Cox*, 1 Sneed, 339. Approved: *Lambeth vs. Clark*, 35.

2. If the chose be due from a corporation, the notice to an officer not connected with the duty of making payment, or subject to be served with process, will not avail: *Id.*

#### ASSUMPSIT.

The captain of a steamboat may, upon the presumption that he is owner, arising from his possession, maintain *assumpsit* for goods delivered by mistake to the consignee of other goods, and sold by such consignee: *Hill vs. Talmadge*, 3.

#### ATTACHMENT.—REPLEVY.

1. A party desiring to replevy property attached may, at his option, give bond either for the debt or the value or return of the property: *Barry vs. Frazier*, 12.

2. A bond given in double the amount of the debt, which was less than the value of the property, with condition that if the said G. shall pay said debt, etc., or the value of the property so attached, etc., or so much as the court shall order, and in other respects comply with the decree, then to be void, is a bond to pay the debt: *Id.*

3. Destruction of property replevied is the loss of the surety: *Id.*

4. In a contest of priority by bill of interpleader, between an assignee of a debt and an attaching creditor, the creditor must show a valid affidavit to support his attachment: *Lambeth vs. Clark*, 35.

5. *Lien, how waived.*—An award of execution generally, without any order for disposition of the property, is a waiver of the lien of the attachment: *Hillman vs. Werner*, 196.

6. An equitable estate is not subject to the levy of an attachment at law: *Id.*

7. Case cited: *Lane vs. Marshall*, 1 Heis., 34: *Id.*

8. In a court of equity, an equitable title, if attached, must be described as such: *Id.*

9. *Damages for suing out.*—J. L. P. & Co., sold cotton to C. B. & Co., and drew on a bank for payment, which the latter shipped to T. B. & Co., Boston. The bank refused to pay the check of C. B. & Co., and the cotton was attached by them, at Louisville, Ky.

C. B. & Co., had, in the meantime, drawn on T. B. & Co., for two-thirds of the value of the cotton, and the First National Bank of M. had discounted the bills, taking the bills of lading as security. T. B. & Co. refused payment on account of the attachment suit. The bank then intervened in the suit, and was held to have priority. On a sale, the cotton failed to bring enough to pay the bank debt, a decline having taken place, and the bank sued J. L. P. & Co. for the deficit. *Held*, not to be entitled to a recovery: *First Nat. Bank of M., vs. Pettit*, 187.

10. *Bond.*—An attachment bond given in the alternative to pay the debt or deliver the property, the value of the property being the greater, in the court below a decree was rendered for the debt. On affirmance in the Supreme Court, the decree with interest, was greater than the value of the property. *Held*, that the judgment must be for the decree: *Barry vs. Gibson*, 110.

11. A municipal corporation is not subject to garnishment at the suit of a creditor of one of its employees: *City of Memphis v. Luski*, 151.

12. *Judgment venditioni exponas.*—A judgment to preserve the lien of an attachment on land ought to direct the satisfaction of the judgment by sale: *Staunton vs. Harris*, 116.

13. By taking judgment for the debt simply, and issuing a *fi. fa.*, the lien of the levy of the attachment is lost: *Id.*

14. The property of a drawer of bills, protested for non-acceptance, removing from the State, is subject to be attached before the bills are due; and a subsequent acceptance will not affect the attachment: *Mer. Nat. Bank vs. McCarger*, 150.

## BANKS.

1. The Bank of Chattanooga, a stock bank, with the same stockholders as the Bank of Memphis, a free bank, marked a large number of its notes redecmable at the Bank of Memphis, and these were issued by the Bank of Memphis to its customers. On the insolvency of both banks, held that the Bank of Memphis could not be made



liable for the issues so marked: *Bank of Chattanooga vs. Bank of Memphis*, 193.

2. If it was illegal for the Bank of Memphis to issue such notes of the Bank of Chattanooga, it is not estopped to insist upon the illegality of the act: *Id.*

3. Where a note was executed without consideration, the fact that it was made colorably and to give apparent solvency to a bank, will not bind the maker: *Fagg vs. Tenn. Nat. Bank*, 106.

4. *Deposit*.—A depositor may recover money deposited, though he made no deposit ticket, took no certificate, and did not leave his signature; and though the books of the bank show no evidence of the deposit, the deposit being credited to another by mistake, and paid out to him: *Jackson Ins. Co. vs. Cross*, 113.

5. The precautionary rules which a bank adopts for its own protection against mistake, it is incumbent on their officers to enforce; not on their customers: *Id.*

6. That a depositor has once drawn a check, payment of which has been refused, is no bar to a suit by him in his own name: *Id.*

#### BANKRUPTCY.

1. A bankrupt can not have relief in respect to lands where the title to the land, or his interest in it, is vested in his assignee by the bankruptcy: *Muller vs. Erich*, 132.

2. The effect of the bankruptcy can not be avoided by an averment that the bankrupt is a trustee for his wife, the wife not being made a party: *Id.*

See **BILLS AND NOTES.**

#### BILL OF EXCEPTIONS.

1. An agreement of counsel, inserted in the record, may supply a defect in a bill of exceptions: *Tomeny vs. Ger. Nat. Bank*, 78.

2. An agreement of counsel that a certain paper was read on the trial, makes it part of the record for the purpose of a writ of error: *Id.*

3. Such agreement that a paper was read, not showing any exception to it, precludes exception in the Supreme Court: *Id.*

#### BILLS AND NOTES.

1. An indorser of a promissory note, who is not the payee, can not be held liable at law to the payee, on parol proof that he indorsed for the accommodation of the maker: *Brinkley vs. Boyd*, 2.

2. On a note made by R. M. M., Captain steamer Southerner, at St. Louis, and dated there without place of payment, R. M. M. being a citizen of Shelby county, Tennessee, protested, with a certificate of the notary of diligent inquiry at St. Louis for R. M. M.: *Held*, that the indorser was discharged: *Apperson vs. Pritchard*, 124.

3. *Change Bills*.—Notes issued for circulation by the Mississippi & Tennessee R. R. Co., under a law of Mississippi, payable on demand in gold, silver, Confederate notes, or bank notes, that might then be current, were sued on with an averment that they were demanded in gold, silver, or bank notes, there being no Confederate notes in circulation, and the demand being averred at a time when the use of Confederate notes was unlawful. Declaration held sufficient on a judgment by default: *M. & T. R. R. Co. vs. Green*, 119.

4. A judgment in such case, by default, would not be final, but a writ of inquiry would be necessary: *Id.*

5. A party who takes a note, made for the accommodation of his debtor or other person with whom he deals, made payable to the creditor, and not to the debtor, is not a holder in due course of trade: *Turley vs. Bartlett*, 126.

6. A recovery on a note given in consideration of the compounding of a felony, between the holder of the note and the person for whose accommodation the note is made, may be resisted successfully: *Id.*

7. The defense of illegality may be set up on a plea of *nil debit*: *Id.*

8. *Bank—Removal—War*.—On the 20th of February, 1862, A. G. N. executed a note at four months for \$2,804.84, to J. L., payable at the Bank of West Tennessee, Memphis, indorsed by J. L. to F. L. & Co., and by them to the bank. Note protested June 7, 1865. Federals occupied Memphis 6th June, 1862. From that time, F. L. & Co. remained in Memphis, and the maker near that place. A quorum of directors were in the city when the note fell due, but the note had been, by orders of the Confederate authorities, with the assets, taken South, the cashier being with the effects; but he and the President had each visited M., the latter on business of the bank, during the war. No descriptive list was left, but defendants were known to the directors to have a memorandum of the note. The bank made collections during the war, and the directors held one regular meeting and several conferences of two directors or more, at one of which the cashier exhibited a balance sheet. The bank was closed, but the building occupied by others. The president returned with the assets

June 6th, 1865, and the note was protested the 7th: Held, too late. *Bank of West Tennessee vs. Lane & Co.*, 121.

9. *Notary's Certificate*.—A notary's certificate that he had "made diligent search and careful inquiry to find" the drawer of a note, but without success," is not *prima facie* evidence of proper inquiry. His certificate is evidence of facts, but not of conclusions of law: *Cockrell vs. Lowenstein*, 38.

10. *Fraudulent Indorsement—Bankruptcy*.—The payor of a note, or his representative, can not attack the indorsement of the note as being made in fraud of the bankrupt law to defeat a suit by the indorsee: *Wells vs. Schoonover*, 84.

11. *Remittance*.—The indorsement by an agent of a bill or check, drawn payable to the agent, and indorsed for security and convenience of transmission, does not bind the agent to the principal on the failure of the bank drawing the check or bill: *Byers vs. Harris*, 72.

12. A bill of exchange, given payable on demand, dated Salem, Virginia, July 10th, 1869, inclosed in a letter of July 12th, 1869, was presented at Boston for payment, and on refusal, notice given by the latter, dated July 17, 1869, held to be proper diligence: *Southworth vs. Thompson*, 10.

13. Bill sent to payee by mail, to pay precedent debt, presented to payor and payment refused for want of funds, and maker notified to come and settle accounts with payor, maker made impression that he would do so; whereupon payee held up for some months, when he demanded again and protested the bill and sued the maker on it, and the original demand: Held that the bill would be presumed not to have been taken in payment. *Id.*

14. An indorser released by failure to make demand and give notice, with full knowledge of the facts, promised to pay, stating that there was at least a doubt, if he was legally bound, but that at any rate he was morally; held bound by his promise: *Williams, executor, vs. Union Bank*, 143.

15. *Insolvent Bank Bills to settle up*.—The holder of a negotiable paper, as a certificate of deposit, attempting to set it off against a note in the hands of the receiver of an insolvent bank, must show that he held the note at the time the bill was filed to settle the affairs of the bank: *Smith vs. Mosby*, 145.

16. One partner indebted to a bank can not set off a debt due to the partnership assigned to him after the insolvency of the bank and bill to settle it up: *Lanier vs. Gay. Sav. Ins.*, 188.

17. Elam took of Johnson a note due December 25, 1860, on Mor-

risson, who was in his employ, and agreed to account with Johnson for what he might owe Morrison; the balance to pay over when collected, or return the note, as he might prefer. Elam settled with M. in November, 1860, and owed him \$90, for which he gave him a note, which was transferred to a third party: *Held*, that Elam was only liable for the amount he owed on the 25th of December, 1860: *Webb, M. & Co. vs. Johnson*, 14.

18. He was only liable for failure to return the note on demand, not for an indefinite retention of it without demand: *Id.*

19. To a note in favor of Elam, transferred to plaintiffs after due, and after this transaction, they could set-off any sum which Elam was liable to Johnson for on the above contract: *Id.*

### CARRIERS.

1. *Connecting Lines.*--A passenger on a line of connecting railroads, obtaining a ticket from the first of the roads, with through checks for baggage. His baggage was broken into and partly taken, while on the first road. He completed his journey, and sued the last of the connecting roads: *Held*, that in the absence of proof of special contract, he could not recover: *Furstenheim vs. M. & O. R. R. Co.*, 144.

2. A depot agent, in the absence of any instructions known to the shipper, has power to make special contracts for the transportation of goods. And if a party purchase upon the faith of an undertaking of such agent, which the company fails to fulfill, it will be no excuse that it was not practicable to furnish the transportation; and the goods will be at the risk of the company: *Watson vs. M. & C. R. R. Co.*, 192.

3. If the contract be the ordinary one, and the agent refuse to receipt for the goods for want of transportation, and without previous action on the faith of a special contract, the excuse in time of war will be a good one: *Id.*

### CHANCERY PLEADING.

A defendant can not rely upon a ground of defense not distinctly made in his answer: *Rogers vs. Brian*, 63.

### CHANCERY PRACTICE.

1. A report of the amount due on the notes of a purchaser at Chancery sale, may be made without notice to him: *Mosby vs. Hunt*, 111.

2. A re-sale may be ordered by a court without notice to a purchaser at a sale under its decree, and without redemption: *Id.*

3. *Decree usury*.—A bill being filed to abate a note and deed of trust for usury, but not stating the amount of the usury, on answer admitting usury to about a stated sum, the injunction was dissolved, and the defendant permitted to have a sale for the amount claimed in his answer. The Supreme Court superseded the order; and on motion to discharge the *superseas*, it was denied, until the amount of usury is ascertained: *Paute vs. Wheatly*, 105.

4. A decree to sell in satisfaction of a mechanic's lien, can not be executed after the death of the owner of the land, without revivor: *Rogers vs. Brian*, 63.

5. It may be otherwise as to a decree to foreclose a mortgage or deed of trust: *Id.*

6. If an answer is filed as a cross bill, without bond for cost, it is too late to object for the want of bond after appearing and answering the cross bill: *Hall vs. Fowlkes*, 37.

7. A bill filed by a purchaser of land against the holder of the legal title, to remove it as a cloud from the title of the vendor who was made a party defendant, but no relief prayed against her, was *held*, not to support a decree against the vendor on covenants of warranty, though on cross bill the right was adjudged to be in the holder of the legal title: *Id.*

8. A rule making process returnable to rule days being in force, a publication requiring appearance to a rule day, is good: *Fellowes vs. Cook*, 117.

9. A non-resident showing as cause for setting aside a decree, cause which is wholly insufficient, is not entitled on appeal, to have the decree set aside: *Id.*

10. *Decree to bar redemption—Who may object*.—Where land is sold under a decree barring the right of redemption, but the fact that it was done on the application of the complainant, does not appear, the purchaser after confirmation can not object that the sale does not effectually bar the right of redemption: *Bank of Louisville vs. Leftwich*, 148.

11. The objection must come from parties entitled to redeem: *Id.*

12. *Guardian ad litem.—Appointment, when presumed*.—Where a person answers as guardian *ad litem*, and no exception is taken, and the Chancery Court acts upon his answer; an appointment as guardian *ad litem* will be presumed, in affirmance of a decree: *Id.*

13. *Account, when denied*.—Where it is evident from the facts disclosed in a record that the balance of accounts is against a complainant, and the defendant waives any relief, no account will be decreed: *Proome vs. McLemore*, 165.

CHANCERY SALE—CONFIRMATION.

1. *Relief of Purchaser.*—A purchaser will not be relieved from a purchase, at Chancery sale, for a defect known to him before confirmation, though not known until after the sale: *Spence vs. Armour*, 5. Same on re-hearing, 53.

2. A material mistake as to boundary and frontage of a lot in a city, will be a good ground of setting aside a sale: *Id.*

CHARGE OF COURT.

A charge of the court wholly inapplicable to the facts, if calculated to mislead the jury, is a ground of reversal: *Crenshaw vs. Smith*, 15.

CHECKS.

1. A certified check is an admission on the part of the banker that he holds that amount of money of the drawer, and an undertaking to hold it for the payment of the check: *Andrews vs. Ger. Nat. Bank*, 45.

2. The liability of the drawer to the holder of the check is not affected by the fact that it is certified at his request, nor is the duty of the holder to make demand, or the degree of diligence required of him, modified: *Id.*

3. If certified after it is taken by the holder, and at his request, it seems the rule is different: *Id.*

4. During the day on which it is drawn or issued, and the next day, a check is at the risk of the drawer, afterwards, at the risk of the holder: *Scoolfield vs. Moon*, 9.

5. If the payee of a check pass it to a third person, who takes it absolutely as cash, without recourse, the holder is not thereby precluded from charging the maker: *Id.*

CONFEDERATE TREASURY NOTES.

*Clerk.*—A clerk of a court, authorized by law to receive money on an execution, accepted bank notes and Confederate treasury notes in payment: *Held*, to be a good discharge of the execution: *Burford vs. Memphis Bulletin Co.*, 128.

CONSIDERATION.

*Recital of Payment.*—A recital of the payment of the consideration of an instrument is conclusive in a controversy as to the validity of the paper, but the payment may be denied in a controversy as to the recovery of the money: *Sou. L. Ins. Co. vs. Booker*, 79.

## CONSTITUTIONAL LAW.

1. *Appropriation of private property to public use.*—The rule laid down in *Woodfolk vs. N. & C. R. R. Co.*, 2 Sneed, 437, as to the constitutional mode of estimating the value of land taken for public use, applies to land taken by a municipal corporation for a street: *City of Memphis vs. Bolton*, 141.

2. Under Art. 2, s. 17, of the Constitution of 1870, an Act of Assembly which increases the State tax on privileges, is valid, though the title of the Act is "An Act to fix the State tax on property:" *Cannon vs. Mathes*, 138.

3. The provision that the subject of a bill shall be expressed in the title, is mandatory, not merely directory. But it is to be liberally construed: *Id.*

4. And the title above given is a sufficient indication of the subject: *Id.*

## CONSTRUCTION.

1. *Error.*—Where a party was allowed, as a witness, to state that a certain act was in violation of certain instructions in writing: *Held*, error, as being a construction by the witness of a writing: *Foster vs. Partee*, 114.

2. *Continuance.*—Where a continuance was asked upon the ground that the witness absent would prove items in an account set-off, and was refused, and the verdict negatived the entire ground of the set-off: *Held* not to be error: *Walt vs. Walsh*, 16.

3. The refusal of a continuance asked upon the ground of a witness being absent who would prove an important fact, which the bill of exceptions shows was disproved by such a weight of testimony as would have overwhelmed any witness, is not a ground of reversal: *Id.*

4. *Same.*—Where an affidavit for continuance shows that the defendants have personal knowledge of the fact, and are competent to prove it, and there is no contradictory proof in the record, the refusal of a continuance on account of the absence of the witness who would prove it, is no ground of reversal: *Id.*

## CONTRACT.

1. *Receipt.*—A writing, "Rec'd, June 2, 1865, of J. J. P., \$15,000 New York funds, to be converted into coin and hand Brown Bros. to be forwarded Brown, Shipley & Co., as they did for Thos. Boyle, 20 ult.," is a contract to convert and deliver, with instructions to forward, &c.



2. J. B. K. directed K. & Co. to convert \$15,000 into gold and hand to me, to be issued in the name of J. J. P.: *Held*, that if the fund was converted, it was subject only to the order of J. B. K., and not of J. J. P.: *Polk vs. Kirtland*, 179.

3. *Deed*.—Where a seal is necessary to the validity of a deed, the failure to affix the seal does not render the deed wholly inoperative, but it would still operate as a written contract to convey; and as such would form a sufficient consideration for purchase money notes: *Brinkley vs. Bethel*, 87.

4. In such case, notes being given for purchase money at one, two and three years, they may be recovered upon without tender of a new deed: *Id.*

### CORPORATION.

1. *Contract*.—A resolution to take stock being referred to a committee, they reported to the city government a recommendation "that the city subscribe \$10,000, provided the company agree to furnish gas at one-half the price paid for the use of the city. The president of the gas company being present accepted the terms orally, and afterwards the city was indorsed on the stock book as a stockholder. The city paid three instalments of stock, and resisted the payment of the remainder as not being bound by the subscription: *Held*, a binding subscription: *City of Memphis vs. Gay. Gas Co.*, 139a.

2. *Municipal Charter—Incidental Powers*.—Under an authority to provide for lighting the streets, and the doing of all things necessary to accomplish that object, and to purchase and hold real estate for gas works, and to do all things a natural person might do touching the same, the corporation of Memphis has power to subscribe for stock in a gas company organized to make or furnish gas in the city, on condition that the company furnish gas to the city at a reduced rate: *City of Memphis vs. Gayoso Gas Co.*, 139a.

3. Where the mayor of a city corporation, in an emergency, employed counsel in important litigation, pending in another State, by writing under the seal of the corporation, and the counsel performed service which was recognized by the several branches of the city government: *Held*, that the corporation was liable to pay for the service: *City of Memphis vs. Adams*, 137.

4. The existence of the corporate seal to a paper is *prima facie* evidence that it was placed there by proper authority. *Id.*

5. *Subscription of Stock—Capital*.—A charter fixed the capital stock of a company at \$25,000 with the liberty to increase the

amount from time to time, to \$300,000, afterwards amended by making the amount \$1,000,000. Stock was subscribed to \$30,000, and then organized. The defendant's subscription of \$1,000 made the stock when he subscribed \$25,500, and he voted in the organization. Shortly after the company authorized the president and secretary to open books of subscription to the amount of \$600,000, to be kept open thirty days, unless the amount should be sooner raised, subscribers to pay ten per cent. on closing of the books. The amount being raised to \$150,000 the books were closed, and calls made: *Held*, that the subscriber was liable: *Rearl vs. Gay. Gas Co.*, 120.

6. *Meeting of Board*.—A corporation may, without express law, have informal or special meetings. *Id.*

7. A call made by a president, by direction of the board, is good. *Id.*

8. *Mandamus*.—A mandamus lies to the secretary of a corporation to compel the transfer of stock bought by the applicant for the writ at execution sale: *Memphis Appeal Co. vs. Pike*.

9. Stock in a corporate company is subject to the lien of a judgment as other personal property. *Id.*

10. A sale of stock after the test of an execution afterwards levied on it, is void as against the judgment creditor, or a purchaser at a sale under the execution. *Id.*

11. A levy on stock does not require a manual seizure of the certificate or other similar act. Notice to the secretary or other officer, is in lieu of seizure. *Id.*

#### DIVORCE.

1. *Evidence*.—The question whether the husband or wife are competent witnesses in a divorce case, is an open one in Tennessee: *McAlister vs. McAlister*, 191

2. The question is not presented in a case in which the husband (defendant) offers himself as a witness, but the bill of exceptions does not show what he proposed to prove. *Id.*

3. Circumstances constituting abandonment, and turning out of doors and refusing to provide for wife: *Id.*

#### EMANCIPATION.

Negroes, formerly slaves, upon their being emancipated, were by that fact, and without legislation, capable to sue and be sued, and entitled to all the rights of citizens before the courts; and it is improper to sue for them in the name of a next friend: *Hunt vs. Unry*, 159.

ERROR.

An error against the defendant in error can not be corrected in the Supreme Court, in a law case. He must prosecute a writ of error.

ERROR.—CORAM NOBIS.

1. A writ of error *coram nobis* may be dismissed, if from the petition it appears that the writ is improperly granted, or that no assignment of errors can be based upon the facts: *Gallena vs. Landhemer*, 26.

2. The fact that a memorandum of the name of the defendant's attorney was handed to the clerk, who failed to mark it on the docket, is no ground for error *coram nobis*; since if marked it would not prevent a judgment by default. If by courtesy it might have done so, that would not alter the case: *Id.*

3. A writ of error may bring up the whole of a cause, original and on writ of error *coram nobis*: *Carney vs. McDonald*, 56.

4. Where on error *coram nobis*, a void judgment is affirmed, and judgment against plaintiff in error and surety, on error to Supreme Court to bring up original cause and error *coram nobis*, the latter judgment will be vacated: *Id.*

5. Where the record shows that the parties appeared by their attorney, it is not competent on error *coram nobis* to deny the presence of attorneys: *Id.*

6. It is no sufficient ground for a writ of error *coram nobis* that the plaintiff in the writ relied upon his co-partners and co-defendants to make his defense, denying their authority to bind him by note: *Mem. Ger. Sav. Ins. vs. Hargan*, 77.

EVIDENCE.

It seems that letters received in the course of a protracted business correspondence, acted on as genuine, and becoming the foundation of important business transactions, are admissible as evidence, without direct proof of genuineness: *Byers vs. Harris*, 72.

2. *Bond.--Surety.*—The sureties on a bond for the good behavior etc., of a book-keeper, are not bound by his admissions of misconduct, made after the fact, to a meeting of the bank directors, met to inquire into the facts: *White vs. Ger. Nat. Bank*, 50.

3. *Character.*—Where an engineer in charge of a locomotive when an accident occurred, is dead, his character for prudence and caution is admissible in evidence: *M. & C. R. R. Co. vs. Harrison*, 115.

4. *New Trial*.—While it is not error to admit evidence improperly if it is afterwards excluded, it may be error if it be inflammatory in its nature, or calculated to excite the prejudices of the jury: *Jackson Ins. Co. vs. Cross*, 113.

#### EXECUTION SALE.

1. *Taxes*.—The purchaser at execution sale can not abate his bid by the amount of taxes in arrears upon the land: *Staunton vs. Harris*, 116.

2. A plaintiff in an execution who has purchased stock in an incorporated company, on his judgment, if he afterwards receive from the debtor the whole of his debt, including his bid, will be presumed *prima facie* to have waived his purchase: *Mem. Appeal Co. vs. Pike*, 127.

#### FACTOR.

1. The customers of a commission merchant or cotton factor have the right to appropriate the amounts due for their goods for their own debts: *Jackson Insurance Co. vs. Partee*, 169.

2. On the death of a cotton factor, uncollected proceeds of goods sold ought to be paid to the customers for whose goods the debts are due, and not be retained for the creditors of the deceased: *Id.*

#### FRAUD.

1. Must be established by full proof: *White vs. Bettes*, 71.

2. Colorable conveyances are badges of fraud—but not conclusive: *Id.*

#### JUDGMENTS.—CORRECTION OF.

1. *Jurisdiction*.—Jurisdiction to correct judgments within twelve months after rendition, must be strictly pursued: *Carney vs. McDonald*, 56.

2. An entry purporting to correct judgment without notice, and without showing on what grounds, and contradicted by the record, is void: *Id.*

3. A judgment against a surety, for cost, omitted when the original judgment was entered, and entered at a term subsequent to an appeal in the cause, is a nullity: *Gallena vs. Landhemer*, 26.

4. An order reciting that in entering a former judgment the name of J. B. as surety was omitted, and proceeding, "it is ordered that the entry be amended so as to include J. B.'s name as such security in the full amount of the debt and costs, and that his name be included in the execution awarded:" *held*, not to operate as a judgment against J. B.: *Id.*

### JUDGMENT BY DEFAULT.

1. A judgment by default, taken upon a count based on a judgment in the *Civil Commission*, (a military court of Memphis,) is void, the judgments of the Commission having no validity in the view of the regular courts of the State: *Walt vs. Thomasson*, 170.

2. A void judgment by default, may be enjoined: *Id.*

### JUDICIAL KNOWLEDGE.

The courts can not judicially know that Tennessee Bank notes were current at a particular time: *Laird vs. Folwell*, 133.

### PARTNERSHIP.

1. The creditors of a partnership, where one partner has sold out to another, have no lien on the partnership goods, to secure partnership debts: *Morrison vs. Garth*, 13.

2. A deed of trust on property so conveyed to secure individual debts of the purchaser, is good against the creditors of the firm: *Id.*

3. *Successive firms of same name.*—A note outstanding in the name of a firm, was renewed by a member of a new firm of the same name, he being the common member of both, but without authority of the other member of the new firm: *Held*, that the latter was not bound: *Waterhouse vs. Plant*, 155.

4. Partnership creditors are entitled, as to partnership debts, to priority over individual creditors. Individual creditors to priority over partnership creditors, as to individual debts: *Jackson Ins. Co. vs. Partee*, 169.

### PLEADING.

1. Where a new count is filed after issue, and the cause proceeds to trial without new pleas, it will be presumed that the old pleas were applied to the new count, or that the new count was abandoned: *Crenshaw vs. Smith*, 15.

2. A justification under a writ of attachment must be pleaded: *Id.*

### PRACTICE—RULE OF COURT.

*Power to make.*—The Circuit Courts have the power to make a rule that, upon a call of the docket, counsel shall state upon honor whether they have a valid defense, and to render judgment in case of refusal to answer: *Tomeny vs. Ger. Nat. Bank*, 78.

## RAILROAD.

1. *Employees, Accident to.*—The right of one employee of a railroad to recover for accident resulting from the neglect of another in a different employment, affirmed: *Lou. & N. R. R. Co. vs. Robinson*, 190.

2. *N. & C. R. R. Co. and M. & C. R. R. Co. vs. Carroll*, MS. Knoxville, 1871, approved: *Id.*

3. The statutory precautions to be observed by railroads, do not apply to the movements of engines and trains in the yards and depot grounds of the company, and in regard to the employees of the company, but to their running on the road, or as applied to the general public: *Id.*

## REPLEVIN.

Where replevin is brought, but the property is not found, and the declaration is in detinue or trover, there can be no judgment against the plaintiff for the value of the property: *Carney vs. McDonald*, 56.

## STATUTE.

When a right is given and a remedy prescribed by the same act, that remedy must be pursued: *Flatley vs. M. & C. R. R. Co.*, 112.

## SURETY—RELIEF.

1. *Quia timet.*—A surety may, upon a change of circumstances subjecting him to danger of loss, maintain a bill *quia timet*: *Miller vs. Speed*, 30.

2. The death of the principal, and the impending distribution of his estate, is such change as will authorize a bill by a surety for indemnity from liability to a remainderman for funds in the hands of a tenant for life: *Id.*

3. The indemnity required will be substituted security or the deposit of the money in court: *Id.*

## TAXATION.

1. *Exemption in Railroad Charter.*—The exemption in the charters of the Mississippi Central Railroad, and Memphis and Charleston Railroad, of the roads, fixtures, and appurtenances, from taxation, does not include a hotel erected on twenty acres of land at Grand Junction, under lease from the companies, and to be kept for the accommodation of passengers of the two roads: *Day vs. Joiner*, 81.

2. The exemption extends to such buildings, &c., as are indispensable. Depots, car-houses, water-tanks, repair shops, houses for switch and bridge tenders, coal and wood yards for fuel for locomotives, are exempt. Lands for dwellings for employees, car or locomotive, ———, coal mines, coal yards, warehouses, and such erections as are convenient or needful for profit merely, are not exempt: *Id.*

#### TRUSTEE.

*County Court Jurisdiction.*—The Code, s. ———, vesting the County Court with power to appoint trustees, does not confer any jurisdiction to inquire into any matter *aliunde* by which the deed may be avoided, as infancy: *Taylor vs. Chapman*, 56.

#### TRUST.

1. The legal title to lands in the hands of a trustee for another, is not subject to execution at the suit of a creditor of the trustee: *Baker vs. Hardin*, 197.

2. If a trustee convey to his *cestui que trust*, by deed, without registration, the land is not subject to the lien of judgments of the creditors of the trustee: *Id.*

3. Case cited: *Sandford vs. Weeden*, 2 Heis., 71. See also, *Walker vs. Thomas*, 6 Hum., 93.

#### VOLUNTARY SETTLEMENT.

1. A husband may make a voluntary settlement upon his wife, if it does not have the effect to hinder and delay creditors: *White vs. Belles*, 71.

2. If a conveyance is made by a husband to a wife under the erroneous belief that he is bound by an agreement with her, such mistake will not entitle his creditors, in the absence of fraud or undue influence, to attack the conveyance: *Id.*

3. To avoid a settlement by a husband on a wife, as to subsequent creditors, they must show precedent debts: *Id.*

4. Individual debts to the amount of \$700, with “ample property” to pay, and partnership debts to about \$21,000, with firm assets “deemed perfectly available,” \$33,160, with judgments obtained after the settlements (from 15 months to 21 months) to the sum of \$3,700, is not sufficient to set aside a voluntary conveyance in favor of a subsequent creditor: *Id.*

5. The law favors provisions for the support and comfort of wives and families: *Id.*



## WAR.

*Proclamation of.—Non-intercourse.*—The proclamation of the President, under the Act of August 16, 1861, applied to trade between occupied territory and the rest of the United States, not between such occupied territory and the Confederate States not so occupied.

## BOOK NOTICES.

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*A Treatise on the Law of Estoppel and its Application in Practice.*  
By MELVILLE M. BIGELOW. Boston: Little, Brown & Co., 1872.

This work, we think, will be found very useful to the profession. It is a full and exhaustive view of the law of Estoppel, with copious citations from the latest decisions. Every lawyer knows that this branch of legal learning has been largely developed of late years. Formerly, the doctrine of estoppel was not favored by the courts, because it was considered, in the light of Lord Coke's definition, as closing a party's mouth "to allege and plead the truth." This was an unfortunate definition, as our author suggests, and he correctly adds: "It is quite safe to say, that, at the present day, it is never employed to exclude the truth; its whole force and effect are to preclude parties, and those in privity with them, from unsettling a matter which they have, in solemn form, admitted and adopted." Thus defined, it is obvious that the doctrine is unexceptionable, and, in fact, a powerful instrument in the hands of the courts for the attainment of the ends of justice.

The author divides his subject into three parts. Part I, treats of Estoppel by matter of record, to which of course belongs the doctrine of *res judicata*; Part II, treats of Estoppel by matter of deed; and Part III, of Estoppel by matter in *pais*; and, also, the pleading, practice and evidence for the three divisions of estoppel. The first of these divisions has always been recognized by the courts, having been borrowed from the Roman law, but has become quite an important branch of modern law, owing to the increased intercourse between different nations, and the development, as in this country, of the federative system of independent States under one government. The second division has also been long recognized and gradually expanded, while the last, and to the Chancery lawyer the most important division, has grown up within the present century. The younger members of the profession will do well to study this part of the work thoroughly.

The author commences his treatise by a compact Introduction, in which a general outline of the subject has been admirably sketched. In about twenty pages of printed matter he has condensed a general

summary of his theme, with references in foot notes to the pages of the volume in which the subjects may be found treated at length. It is well adapted, as he suggests, to facilitate an acquaintance with the plan and order of arrangement of the text. "The idea," he says, "was suggested by the Introduction of Mr. Adams to his Treatise on Equity, which is one of the most attractive and useful features of that excellent work." We think the remark contained in the latter clause of the sentence applicable in this instance also.

In treating the subject of how far the judgments of a sister State may be impeached by bill in Chancery in another State, for causes which show that it ought not to have been rendered, he refers in a note to one of our own cases thus: "In one case it was held that Chancery would restrain a party from proceeding at law upon a judgment of a sister State before he had made any attempt to enforce it; and this, too, though the attack was directly upon the merits of the case: *Winchester vs. Jackson*, 3 Hay., 305; S. C. Cooke, 420. *But this was clearly an erroneous view of the law.*" page 245, note 4. We doubt the correctness of this conclusion. The weight of authority, as the text shows, is, that when the judgment has been improperly obtained for any cause which would justify the Chancery Court of the same State to limit or restrain its collection, a similar proceeding may be maintained in any other State, *when it is sought to enforce the judgment.* The error, then, in the Tennessee case, if there be error, is in allowing the proceedings to limit and restrain, *before it is sought to enforce the judgment.* The jurisdiction is made to depend upon the effort to enforce the judgment. But, with deference, we submit that the jurisdiction may equally arise from the residence of the judgment creditor in the State in which the judgment is sought to be impeached. If the court has jurisdiction of his person, why may it not limit and restrain the collection of the foreign judgment, whether he is seeking to enforce it or not? The mere fact that he is proceeding on the judgment may give jurisdiction to enjoin, whether the judgment creditor be within the limits of the State in which the proceeding is taken, or not. So, the personal presence of the creditor may suffice without effort to enforce, the bill being in the nature of a bill *quia timet*, or for the cancelling of a void instrument. The Tennessee case is only an extension of the settled doctrine, that a foreign judgment may be limited and restrained by the courts of another State, for the same causes which would justify its impeachment in the State where it was rendered; and may seem to be erroneous simply because it is the only case of the kind.

Although we are willing to break a lance with our author for the honor of our State decision, we must concede to him the merit of giving us the opportunity by citing all the cases, whether for or against his view of the law. In this regard, his work is eminently satisfactory, and seems to be exhaustive. We cordially recommend it to our readers.

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*Williams on Real Property.*

We have received from the publishers, Messrs. T. & J. W. Johnson & Co., of Philadelphia, a copy of the *Fourth American*, from the ninth London edition, of this valuable treatise on the principles of the law of real property. Intended originally for the use of students in this difficult and very important branch of the law, the author has so happily condensed his labor that it is not a matter of surprise to us that the profession generally have called for a new edition of the work. The great favor that it has met with, and still continues to enjoy, justifies us in saying that we know of no writer who, in the same space, has set forth more clearly the principles upon which this part of the law is based—a fact which renders him doubly acceptable to that class for whom the work is more especially designed. The divisions of the various subjects treated of are clear and readily and firmly impress themselves on the mind of the student, rendering his study in the more minute branches both easy and profitable. The arrangement adopted by the author, is somewhat different from that pursued by other writers, in that he treats first of a life estate, then an estate tail, and following that an estate in fee simple—the life estate formerly being the smallest estate a freeman would accept—an arrangement much more desirable than the other method of deriving all from the fee simple estate.

So much of the old, obsolete feudal law, as is essential to the right understanding of the science as it now exists, is given, but no more; and in this we have always thought the author deserving of the highest praise, not only for the omission of that which could only confuse, but for his acute discrimination in the selection of that which is clearly necessary, even to the most anxiously progressive student.

The notes of the editors and the references to the English and American statutes and decisions, so far as we have been able to examine, are so pointed and correct that we can not but regret that

they are not more enlarged, though an addition of this kind to its value, might have rendered it, in form, less convenient to students.

As it is, however, the growing importance of the subject treated of, the manner of its treatment, the convenient size of the work, and the large, clear print in which it appears, ought to render this edition, what it doubtless will prove to be, a favor to the profession.

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*Principles of the Law of Personal Property.* By JOSHUA WILLIAMS, Esq.

As a fit and necessary companion to the late edition of the distinguished author's work on the "Principles of Real Property," the publishers, Messrs. T. & J. W. Johnson & Co., of Philadelphia, have lately issued a Fourth American from the Seventh London edition, of the same writer's work on the "Principles of the Law of Personal Property, with additional notes and references, by Samuel Wetherill, Esq. A small portion of this volume was originally embodied in the work on "Real Property," but the long-felt necessity for a work devoted exclusively to the subject of which the present treats, induced the author to supply that demand by separating the two and enlarging, by several additional chapters, his work on this subject. The same excellencies that characterize his former work, are to be noted of the volume before us. An unmistakable clearness in the division of the subjects, and of the rules governing this class of property as opposed to real, with a conciseness of treatment entirely consistent with the greatest perspicuity, a quality peculiarly desirable in a writer who addresses himself especially to students. The present edition, with its full and carefully noted references, and particularly to the American decisions, will fill a void hitherto not lightly felt.

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*Abbott's National Digest, a Digest of the Reports of the United States Courts, and of the Acts of Congress from July, 1868, to May, 1872.* By BENJAMIN VAUGHAN ABBOTT. Vol. V., being the first Supplement to Abbott's National Digest. New York: Diossy & Company, 1872.

The first volume of "Abbott's National Digest," was published in

1867, by Diossy & Cockraft and Baker, Voorhis & Co., New York. This was succeeded by three other volumes, the last of which was published in 1868. It was proposed in this work to give "a digest of the Reports of the United States Courts, and of the Acts of Congress from the organization of the Government to the year 1867." It was compiled by Messrs, Austin Abbott and Benjamin Vaughn. Abbott, assisted, however, by gentlemen well known to the profession for their learning and ability, who edited and revised "titles of importance or special character," and whose names are given upon the title page of each volume.

The first four volumes bring the work down to 1867, and form a complete digest of decisions and statutes to that time.

The present volume is the first supplement to "Abbott's National Digest," and extends from July, 1868, to May, 1872. Although numbered consecutively with the other four volumes, and styled Vol. V., it may be regarded as separate and distinct from its predecessors, and is a complete and finished digest in itself for the period which it embraces. It contains adjudications and statutes in all branches of Federal jurisprudence, law, equity, criminal and admiralty.

We are glad that Mr. Abbott is continuing in this volume the work so well begun a few years since, and feel sure the profession will welcome this first supplement as a valuable accession to those which have gone before.

The fifth volume seems to have been edited and compiled entirely by Mr. Benjamin Vaughn Abbott, the name of Mr. Austin Abbott not appearing on the title-page; nor those of other gentlemen which we were accustomed to see in the preceding volumes. But the long experience and high reputation of the present editor as a maker of digests, give an assurance that his work has been performed with faithfulness and ability.

The general plan and arrangement adopted in the first four volumes, have been adhered to in the new volume. The typography is excellent, being clear and distinct, and remarkably free from errors. In addition to the general alphabetical divisions of the subjects at the top of the page, there are sub-divisions of titles in the pages with headings in larger type than the body of the page.

In the beginning is a table of the books of reports embraced in the volume containing a list of the reports cited, with a short notice under each, of the time of publication, period embraced by the decisions, and the general character of the work. There are also citations of decisions not contained in any regular reports, but taken from different law periodicals of the day.

A most important feature is a table of "cases criticised." In this table the name of the case is given, with the volume and page of the report, the points decided, followed by references to adjudications, which affirm, explain, modify or overrule the decision. This table comprises some fourteen pages, and will doubtless prove very valuable to the practicing lawyer.

Of course the most important reports referred to, are those of the Supreme Court of the United States. The supplement comprises six volumes of Wallace's Reports from volume six to twelve, inclusive. The many important and interesting questions, however, both of a civil and criminal nature, which have arisen since the war, especially upon the construction of Federal statutes, and which have not been determined by the court of last resort, together with the learning and ability displayed in their discussion by many of the judges, give to the Circuit Court reports more than usual value and prominence. Mr. Abbott has embraced in this volume, many of these Circuit Court reports, some being a continuation of those included in the first four volumes, and others now referred to for the first time.

Another noticeable feature is the index at the bottom of the page. This is given under each title, and refers back to the preceding volumes where the same subject is treated; thus under the title, "Appeal," page 18, at the foot of the page is "Index to Appeal." Meaning of appeal, ii, 117. Distinction between appeal and writ of error, i, 87, etc."

We occasionally observe some evidences of hasty work, especially on page 73, under the title, "Bills, Notes and Checks," is the following section: "Consideration. A promissory note given in consideration of Confederate treasury notes, is void. 5. Circ, (Ga.) 1868, *Scudder vs. Thomas*, 35 Ga., 330; N. Dist. of Ga., 1868, *Bailey vs. Milner*, 1 Abb., U. S., 261; 35 Ga., 330." These are all the authorities referred to on this subject, and the doctrine as thus laid down is not subsequently qualified in any manner under this title. It is true that under the title, "Contracts," page, 137, the law upon this point is correctly given as laid down in *Thorington vs. Smith*, 8 Wallace, 1, which has been followed in most, if not all the State courts; but this decision, which directly overrules the principle as stated in the section above quoted, should have been referred to under *that* section, as well as under the title, "Contracts," several pages further on.

There are tables of cases and statutes, and also an index of the subjects treated, at the end of the volume.

Amid the rapidly accumulating mass of reports and statutes well



calculated to sometimes bewilder even the most learned lawyer, one can not too highly appreciate the benefits of a digest so admirably gotten up as this one.

We hope Mr. Abbott will not cease from his labors, but that Vol. VI. of "Abbott's National Digest" will appear in due course of time.

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*Law and Practice in Bankruptcy.* The Practice in Bankruptcy with the Bankrupt Law of the United States as amended, and the Rules and Forms, together with Notes referring to all Decisions reported to May 1st, 1872; to which is added "The Rules of Practice for all the Courts of Equity of the United States," by ORLANDO F. BUMP, Register in Bankruptcy. Fifth Edition. New York, Baker, Voorhis & Co., Publishers, 66 Nassau street.

Long before the passage of the United States Bankruptcy Act of 1867, a uniform rule in cases of insolvency had been a deeply felt want in American jurisprudence. Conflicts of the gravest nature often arose under the manifold insolvent laws of the various States. The bankruptcy laws of the European nations had proved extremely wholesome for the trade, beneficial both for creditors and debtors. The intercourse between the States of America became very much increased in consequence of and immediately after the late civil war. "The misfortunes of the protracted war had placed a burden of honest debts upon many, which they could never hope to pay." It is therefore quite natural that our national legislature should have turned their attention to the framing of the uniform system of bankruptcy throughout the United States, which finally became the law of the land in March, 1867.

New as these proceedings were to the Bench and Bar of the country, the rulings under and the constructions of the Act soon became numerous, and of widely different conceptions. Decisions fairly rained over the land, and with that characteristic so common to the American Judge—for the sake of justice in some instances, but in most cases for the sake of renown—the reports of decisions in bankruptcy swelled to numerous volumes in the short period of a few years.

The Bankruptcy Law is an institution among us, and like all other institutions of that kind, it becomes more difficult in its bearings and practice, the more our wise judges tinker with it, and the more different constructions they give its sometimes oracular provisions.

It is therefore natural that the work whose name heads these lines should at once have commanded the attention of the profession, and it is equally natural that five editions should have been published, in the short period of three years, after the value of the book had been fairly appreciated. In September, 1868, the author, who is Register in Bankruptcy of the Baltimore District, issues his book, and in May, 1872, the fifth edition leaves the press.

The contents of the book are fully set forth in the title which we print above. The Act itself, with its various amendments, including those passed at the last session of Congress, is given in full. Copious notes refer the reader to all the decisions of the District and Circuit Judges, quoting in full the essential portions of the decisions and their applications. The book opens with a clear treatise on the system inaugurated with the Act, and it leads the reader through the whole process from the time of filing the petition to the final discharge. It dwells at length upon the duties of assignees, and reads a lecture, well digested, to all the officers who have any connection with the various phases through which the bankrupt and his creditors have to pass. It contains all the forms used in bankruptcy proceedings, all the rules governing them; it winds up with a complete general index, which renders it easy to the layman even to wind his way through the labyrinth of the new law.

The author has certainly mastered the subject, and with the aid of the extensive practice enjoyed by him as Register of the most important Bankruptcy Courts, has succeeded in rendering his experience extremely useful. The volume is neatly printed and handsomely bound; it is at once creditable to the printer and binder, and is a lasting monument to the intellect and professional qualities of the author.

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*An Essay on the Principles of Circumstantial Evidence.* By the late WM. WILLS, Esq. Edited by his son, ALFRED WILLS, Esq., Barrister-at-Law, Philadelphia. T. & J. W. Johnson & Co., Publishers, No. 535 Chestnut street, Philadelphia.

This is the fifth American Edition of this valuable treatise, taken from the fourth London Edition. The merits of the work are so well known to the profession, that it would be idle to give it an extended notice here. It has been ten years since the third London Edition of this work was published, and during that time the author

has collected additional material to illustrate the subject of his essay. The section in chapter 3, on scientific testimony, is new. Many parts of the book have been re-written, and it will be found not less worthy than before of the high reputation it has gained as the offspring of an accurate, clear and philosophic mind.

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*Bench and Bar.* Chicago.

*Western Insurance Review.* St. Louis.

*American Law Record.* Cincinnati.

*Solicitor's Journal and Reporter.* London.

*Pittsburg Legal Journal.*

*Maryland Law Reporter.* Baltimore.

*Lancaster Bar.*

*Pacific Law Reporter.* San Francisco.

*Legal Gazette.* Philadelphia.

*Superior Court Reporter.* Cincinnati.

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We have received advance copies of the opinions of the Supreme Court of New Hampshire in the cases of *State vs. Hodge*, *Northern Railroad vs. Concord Railroad and A.*, and *Fisher & A. vs. Concord Railroad and A.*, *Hill vs. Spear*, and *State vs. Jones*. In this last case, which treats at considerable length the law of Insanity, we had prepared an elaborate criticism, which has been reluctantly crowded out by other matter. We expect, however, to present it in the next (January) number. Our thanks for advance sheets of these decisions are due to John M. Shirley, State Reporter.

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We are indebted to Messrs. Sumner, Whitney & Co., Law Publishers, San Francisco, for advance sheets of Index to 40 California and 7 Nevada, State Reports. Also, for a very handsome copy of Olney's Code of Civil Procedure of the State of California, and Sharpstein's Digest of Fire Insurance Decisions, which we are unable to notice at any length, owing to lack of space.



# C H A R T

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Gadsden,	Davidson & Love,	Quincy.



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Oldham,	J. W. Clayton,	Lagrange.
Powell,	A. C. Daniel,	Stanton.
Pulaski,	W. H. Pettus,	Somerset.
Rock Castle,	James G. Carter,	Mt. Vernon.
Russell,	J. A. Williams,	Jamestown.
Scott,	Geo. E. Prewitt,	Georgetown.
Shelby,	Erasmus Frasier,	Shelbyville.

**KENTUCKY—Continued.**

COUNTY.	NAME.	POST OFFICE.
Simpson,	G. W. Whitesides,	Franklin.
Taylor,	D. G. Mitchell,	Campbellsville.
Todd,	J. H. Lowry,	Elkton.
Trigg,	Jno. S. Spiceland,	Cadiz.
Trimble,	Jacob Yeager,	Bedford.
Union,	John S. Geiger,	Morganfield.
Warren,	Bates & Wright,	Bowling Green.
Washington,	Richard J. Browne,	Springfield.
Webster,	A. Edwards,	Dixon.
Woodford,	Turner & Twyman,	Versailles.

**LOUISIANA.**

Ascension,	R. N. Sims,	Donaldsonville.
Avoyelles,	Irion & Thorpe,	Marksville.
Baton Rouge,	George W. Buckner,	Baton Rouge.
Caddo,	Newton C. Blanchard,	Shreveport.
Caldwell,	Arthur H. Harris,	Columbia.
Carroll,	Ed. F. Newman,	Providence.
Catahoula,	Smith & Boatner,	Harrisonburg.
East Feliciana,	Frank Hardesty,	Clinton.
Franklin,	Wells & Corkern,	Winsborough.
Grant,	Rufus K. Houston,	Colfax.
Iberville,	Samuel Matthews,	Plaquemine.
Jackson,	James E. Hamlett,	Vernon.
Lafayette,	Conrad Debaillon,	Vermillionville.
Lafourche,	Thomas L. Winder,	Thibodeaux.
Madison,	Wells & Rainey,	Delta.
Morehouse,	Newton & Hall,	Bastrop.
Natchitoches,	Morse & Dranguet,	Natchitoches.
Orleans,	Sam. C. Reid,	New Orleans, 46 Carondelet Street.
Orleans,	Canonge & Cazabat,	New Orleans, 24 Exchange Place.
Point Coupee,	Thomas H. Hewes,	Point Coupee.
Richland,	Wells & Williams,	Rayville.
"	H. P. Wells,	Delhi.
St. Landry,	Joseph M. M. Moore,	Opelousas.
Tensas,	Reeve Lewis,	St. Joseph.
Terrebonne,	John B. Winder,	Houma.
Union,	Barrett & Trimble,	Farmerville.
Webster,	A. B. George,	Minder.
Washita,	R. W. Richardson,	Monroe.
"	Richardson & McEnery,	"
West Feliciana,	Samuel J. Powell,	St. Francisville.
Winn,	W. R. Roberts,	Winnfield.

**MAINE.**

Kennebec,	Joseph Baker,	Augusta.
Knox,	Geo. H. M. Barrett,	Rockport.
Oxford,	Virgin & Upton,	Norway.
Somerset,	E. W. McFadden,	Kendall's Mills.



**MARYLAND.**

COUNTY.	NAME.	POST OFFICE.
Alleghany,	Semmes & Read,	Cumberland.
Anne Arundel,	Randal & Hagner,	Annapolis.
Baltimore,	Reverdy Johnson & C. G. Kerr,	Baltimore.
"	John Thompson Mason,	"
"	Daniel Clarke,	"
"	John I. Yeilott,	Towsonton.
Caroline,	James B. Steele,	Denton.
Cecil,	John E. Wilson,	Elkton.
Charles,	S. Cox, Jr.,	Port Tobacco.
Frederick,	Wm. P. Maulsby, Jr.,	Frederick.
Queen Anne's,	John B. Brown,	Centreville.
St. Mary's,	Combs & Downs,	Leonardtown.
Talbot,	C. H. Gibson,	Easton.

**MASSACHUSETTS.**

Bristol,	Charles A. Read,	Taunton.
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**MICHIGAN.**

Allegan,	Arnold & Stone,	Allegan.
Barry,	Wm. H. Hayford,	Hastings.
Bay,	C. H. Denison,	Bay City.
Calhoun,	Wm. H. Brown,	Marshall.
"	Alvan Peck,	Albion.
Houghton,	Ball & Chandler,	Houghton.
Huron,	Richard Winsor,	Port Austin.
Ingham,	Wm. H. Pinckney,	Lansing.
Isabella,	I. N. Fancher,	Isabella.
Jackson,	Johnson & Montgomery,	Jackson.
Macomb,	Edgar Weeks,	Mt. Clemens.
Marquette,	Maynard & Ball,	Marquette.
Oakland,	O. F. Wisner,	Pontiac.
Oceana,	F. J. Russel,	Hart.
Ottawa,	L. B. Soule,	Grand Haven.
Saginaw,	Gaylord & Hanchett,	Saginaw.
St. Clair,	Atkinson & Parsons,	Port Huron.
St. Joseph,	Mason & Melendy,	Centreville.
Shiawassee,	E. Gould,	Owasse.
Tuscola,	J. P. Hoyt,	Caro.
Wayne,	Meddaugh & Driggs,	Detroit.

**MINNESOTA.**

Benton,	J. Q. A. Wood,	Sauk Rapids.
Dodge,	G. B. Cooley,	Mantorville.
Fillmore,	Murray & McIntire,	Rushford.
Martin,	M. E. L. Shanks,	Fairmont.
Mower,	G. M. Cameron,	Austin.
Olmstead,	Butler & Shandrew,	Rochester.
Ramsey,	S. M. Flint,	St. Paul.
Stearns,	L. A. Evans,	St. Cloud.
Steele,	A. C. Hickman,	Owatonna.
Winona,	Simpson & Wilson,	Winona.

**MISSISSIPPI.**

COUNTY.	NAME.	POST OFFICE.
Amita,	George F. Webb,	Liberty.
Bolivar,	George T. Lightfoot,	Neblett's Landing.
Calhoun,	Roane & Roane,	Pittsboro'.
Carroll,	James Somerville,	Carrolton.
Chickasaw,	Lacy & Thornton,	Okalona.
Chocklaw,	John B. Hemphill,	French Camps.
Claiborne,	J. H. & J. F. Maury,	Port Gibson.
Clarke,	Evans & Stewart,	Enterprise.
Coahoma,	James T. Rucks,	Friars' Point.
Holmes,	H. S. Hooker,	Lexington.
Itawamba,	Clayton & Clayton,	Tupelo.
Jasper,	Street & Chapman,	Paulding.
Jefferson,	B. B. Paddock,	Fayette.
Lauderdale,	Steel & Watts,	Meridian.
Lawrence,	K. R. Webb,	Brookhaven.
Leake,	Raymond Reid,	Carthage.
Lincoln,	Chrisman & Thompson,	Brookhaven.
Lowndes,	Leigh & Evans,	Columbus.
Madison,	S. M. Wook,	Canton.
Marshall,	Strickland & Fant,	Holly Springs.
Monroe,	John B. Walton,	Aberdeen.
Oktibbeha,	Sullivan & Turner,	Starkville.
Panola,	Miller & Miller,	Sardis.
Pike,	Applewhite & Son,	Magnolia.
Rankin,	W. B. Shelby,	Brandon.
Tallahatchee,	Bailey & Boothe,	Charleston.
Tishomingo,	L. P. Reynolds,	Jacinto.
Tunica,	T. J. Woodson,	Austin.
Warren,	H. F. Cook,	Vicksburg.
Washington,	Trigg & Buckner,	Greenville.
Wilkinson,	L. K. Barber,	Woodville.
Winston,	W. S. Bolling,	Louisville.
Yazoo,	Miles & Epperson,	Yazoo City.

**MISSOURI.**

Adair,	Ellison & Ellison,	Kirksville.
Atchison,	Durfee, McKillop & Co.,	Rockport.
Audrian,	Wm. O. Forrist,	Mexico.
Barry,	James A. Vance,	Pierce City.
Barton,	G. H. Walser,	Lamar.
Buchanan,	J. W. & John D. Strong & J. C. Hedenberg,	St. Joseph.
Butler,	Snoddy & Matthews,	Poplar Bluff.
Caldwell,	Lemuel Dunn,	Kingston.
Cape Girardeau,	Lewis Brown,	Cape Girardeau.
Carroll,	B. D. Lucas,	Carrolton.
Chariton,	Charles A. Winslow,	Brunswick.
Clay,	John T. Chandler,	Liberty.
Clinton,	Charles A. Wright,	Plattsburg.

**MISSOURI—Continued.**

COUNTY.	NAME.	POST OFFICE.
Cole,	E. S. King & Bro.,	Jefferson City.
Cooper,	John Cosgrove,	Boonville.
Daviess,	Richardson & Ewing,	Gallatin.
DeKalb,	Samuel C. Loring,	Maysville.
Dent,	G. S. Duckworth,	Salem.
Gentry,	I. P. Caldwell,	Albany.
Grundy,	Daniel Metcalf,	Trenton.
Harrison,	D. J. Heaston,	Bethany.
Hickory,	Charles Kroff,	Hermitage.
Holt,	T. H. Parrish,	Oregon.
Iron,	J. P. Dillingham,	Ironton.
Jackson,	Holmes & Dean,	Kansas City.
Jasper,	Wm. Cloud,	Carthage.
Johnson,	N. H. Conklin,	Warrensburg.
Lafayette,	Ryland & Son,	Lexington.
Lawrence,	John T. Teel,	Mount Vernon.
Lewis,	F. W. Rash,	Monticello.
Lincoln,	Wm. Frasier,	Troy.
Linn,	A. W. Mullins,	Linneus.
"	Thomas Whitaker,	Bucklen.
Livingston,	C. H. Mansur,	Chillicothe.
McDonald,	A. H. Kennedy,	Pineville.
Macon,	A. J. Williams,	Macon City.
Madison,	B. B. Cahoon,	Frederickton.
Mercer,	C. M. Wright,	Princeton.
Miller,	Isiah Latchem,	Oakhurst.
Moniteau,	Moore & Williams,	California.
Montgomery,	L. A. Thompson,	Danville.
New Madrid,	R. A. & R. H. Hatcher,	New Madrid.
Perry,	John B. Robinson,	Perryville.
Pettis,	Richard P. Garrett,	Sedalia.
Phelps,	Alf. Harris,	Rolla.
Pike,	Fagg & Dyer,	Louisiana.
Putnam,	Fred. Hyde,	Unionville.
Ralls,	E. W. Southworth,	New London.
Randolph,	Porter & Rothwell,	Huntsville.
St. Francois,	F. M. Carter,	Farmington.
St. Louis,	Lewis & Daniel,	St. Louis,
"	A. H. Bereman,	571½ Chestnut St. St. Louis,
Saline,	John W. Bryant,	Cor. 4th & Olive Sts. Marshall.
Scott,	J. H. Moore,	Commerce.
Stoddard,	Hicks & McKeon,	Bloomfield.

**MONTANA.**

Edgerton,	W. E. Cullen,	Helena.
Madison,	Samuel Word,	Virginia City.

**NEBRASKA.**

COUNTY.	NAME.	Post Office
Cass,	Maxwell & Chapman,	Plattsmouth.
Johnson,	Charles A. Holmes,	Tecumseh.
Nemaha,	Jarvis S. Church,	Brownsville.
Otoe,	W. W. Wardell,	Nebraska.
Platte,	Leander Gerrard,	Columbus.

**NEVADA.**

Humboldt,	Patrick H. Harris,	Unionville.
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**NEW HAMPSHIRE.**

Cheshire,	E. M. Forbes,	Winchester.
Hillsboro,	G. Y. Sawyer & Sawyer Junior,	Nashua.

**NEW JERSEY.**

Cumberland,	Alex. H. Sharpe,	Millville.
Essex,	John W. Taylor,	Newark.
Hudson,	Joseph F. Randolph, Jr.,	Jersey City.
Hunterdon,	Alex. Wurts,	Flemington.
Mercer,	Leroy H. Anderson,	Princeton.
Middlesex,	James H. Van Cleef,	New Brunswick.
Monmouth,	Charles Haight,	Freehold.
Passaic,	Andrew J. Sandford,	Paterson.
Somerset,	Bartine & Long,	Somerville.
Sussex,	Robert Hamilton,	Newton.
Warren,	J. G. Shipman,	Belvidere.

**NEW YORK.**

Alleghany,	John G. Collins,	Angelica.
Cattaraugus,	Scott & Laidland,	Ellicotville.
Cayuga,	C. W. Haynes,	Port Byron.
Cortland,	John S. Barber,	Cortland.
Essex,	A. C. & R. L. Hand,	Elizabethtown.
Franklin,	Horace A. Taylor,	Malone.
Fulton,	McCarty & Parke,	Gloversville.
Genesee,	J. G. Johnson,	Batavia.
Greene,	Rufus W. Watson,	Catskill.
Kings,	P. S. Crooke,	Brooklyn.
Lewis,	Edward A. Brown, Jr.,	Lowville.
Livingston,	Geo. W. Daggett,	Nunda.
Monroe,	H. & G. H. Humphrey,	Rochester.
Montgomery,	J. D. & F. F. Wendell,	Fort Plain.
New York,	Broome & Broome,	New York, 10 Wall Street.
"	Morrison, Lanterbach & Spingarn,	New York, 200 Broadway.
"	Charles O'Connor,	New York.
"	Richard O'Gorman,	"
Ontario,	Metcalf & Field,	Canandaigua.
Orange,	J. M. Wilkin,	Montgomery.
Otsego,	James A. Lynes,	Cooperstown.
Rensselaer,	G. B. & J. Kellog,	Troy.

**NEW YORK—Continued.**

COUNTY.	NAME.	POST OFFICE.
Richmond,	Nathaniel J. Wyeth,	Richmond.
St. Lawrence,	L. Hasbrouck, Jr.,	Ogdensburg.
Schoharie,	John S. Pindar,	Cobleskill.
Schuyler,	S. L. Rood,	Watkins.
Steuben,	A. M. Spooner,	Avoca.
"	W. W. Oxx,	Bath.
Sullivan,	Arch. C. & T. A. Niven,	Monticello.
Tompkins,	Merritt King,	Newfield.
Ulster,	T. R. & F. L. Westbrook,	Kingston.

**NORTH CAROLINA.**

Anson,	R. Tyler Bennet,	Wadesboro.
Bertie,	James L. Mitchell,	Windsor.
Buncombe,	A. T. & T. F. Davidson,	Ashville.
Cabarras,	W. J. Montgomery,	Concord.
Camden,	D. D. Ferebee,	South Mills.
Carteret,	John M. Perry,	Beaufort.
Catawba,	John F. Murrill,	Hickory Tavern.
"	John B. Hussy,	Newton.
Chatham,	J. J. Jackson,	Pittsboro.
Cherokee,	John Rolan,	Murphey.
Columbus,	J. W. Ellis,	Whiteville.
Currituck,	P. H. Morgan,	Indian Ridge.
Edgecomb,	W. H. Johnston,	Tarboro.
Greene,	W. J. Raspberry,	Snow Hill.
Guildford,	Dillard & Gilmer,	Greensboro.
Halifax,	Walter Clark,	Halifax C. H.
Harnett,	John A. Spears,	Harnett C. H.
Haywood,	W. B. & G. S. Ferguson,	Waynesville.
Jackson,	James R. Love,	Webster.
McDowell,	W. H. Malone,	Marion.
Mecklenberg,	W. P. Bynum,	Charlotte.
Onslow,	Richard W. Mixon,	Jacksonville.
Pasquotank,	C. W. Grandy, Jr.,	Elizabeth City.
Perquimans,	J. M. Albertson,	Hertford.
Pitt,	T. C. Singletary,	Greenville.
Richmond,	Gilbert M. Patterson,	Laurenburg.
Rockingham,	Reid & Settle,	Wentworth.
Rowan,	Blackmer & McCorkle,	Salisbury.
Sampson,	Milton C. Richardson,	Clinton.
Union,	S. H. Walkup,	Monroe.
Wake,	Wm. R. Cox,	Raleigh.
Warren,	R. Pritchard,	Warrenton.
Washington,	Edmund W. Jones,	Plymouth.
Yadkin,	John A. Hampton,	Hamptonville.

**OHIO.**

COUNTY.	NAME.	Post Office
Adams,	F. D. Bayless,	West Union.
Ashtabula,	Woodbury & Ruggles,	Jefferson.
Athens,	Browns & Wildes,	Athens.
Anglaize,	G. W. Andrews,	Wapaconeta.
Belmont,	M. D. King,	Barnesville.
Brown,	Baird & Young,	Ripley.
Carroll,	C. W. Newell,	Carrolton.
Clinton,	J. M. Kirk,	Wilmington.
Columbiana,	Henry C. Jones,	Salem.
Crawford,	Thomas Beer,	Bucyrus.
Cuyahoga,	E. D. Stark,	Cleveland.
Delaware,	J. J. Glover,	Delaware.
Fayette,	S. F. Kerr,	Washington C. H.
Franklin,	John G. McGuffey,	Columbus.
Fulton,	W. C. Kelly,	Wauseon.
Hamilton,	Logan & Randell,	Cincinnati.
"	Moulton & Johnson,	"
"	Henry Stanberry,	"
"	A. Taft & Sons,	"
"	Rufus King,	"
"	Stanley Mathews,	"
"	Thomas T. Heath,	"
"	Benj. Butterworth,	"
"	Hoadley & Johnson,	"
Hardin,	John D. King,	Kenton.
Highland,	R. S. Leake,	Greenfield.
Hocking,	Homer L. Wright,	Logan.
Huron,	Charles B. Stickney,	Norwalk.
Knox,	H. H. Greer,	Mt. Vernon.
Lake,	John W. Tyler,	Painsville.
Logan,	Kernan & Kernan,	Bellefontaine.
Lucas,	Haynes & Price,	Toledo.
Mahoning,	Landon Masten,	Canfield.
Marion,	H. T. Van Fleet,	Marion.
Medina,	Blake, Woodward & Coddington,	Medina.
Meigs,	J. & J. P. Bradbury,	Pomeroy.
Miami,	W. S. Thomas,	Troy.
Montgomery,	J. A. McMahon,	Dayton.
Morgan,	Hanna & Kennedy,	McConnelsville.
Morrow,	Andrews & Rogers,	Mount Gilead.
Ottawa,	Wm. B. Sloan,	Port Clinton.
Paulding,	P. W. Hardesty,	Paulding.
Pickaway,	S. W. Courtright,	Circleville.
Pike,	J. J. Green,	Waverly.
Sandusky,	John Elwell,	Fremont.
Shelby,	A. J. Rebstock,	Sidney.
Stark,	Louis Schaefer,	Canton.
Tuscarawas,	A. L. Neely,	New Philadelphia.
Union,	Porter & Sterling,	Marysville.
Washington,	Knowles, Alban & Hamilton,	Marietta.

**OREGON.**

COUNTY.	NAME.	POST OFFICE.
Baker,	L. O. Sterns,	Baker City.
Benton,	John Burnett,	Corvallis.
Douglas,	W. R. Willis,	Roseburg.
Marion,	Chester N. Terry,	Salem.

**PENNSYLVANIA.**

Alleghany	William Blakely,	Pittsburg.
Bedford,	E. F. Kerr,	Bedford.
Bradford,	Delos Rockwell,	Troy.
Cambria,	George M. Reade,	Ebensburg.
Cameron,	Samuel C. Hyde,	Emporium.
Centre,	McAllister & Beaver,	Bellefonte.
Chester,	Alfred P. Reid,	West Chester.
Clarion,	David Lawson,	Clarion.
Clinton,	C. S. McCormick,	Lock Haven.
Crawford,	H. L. Richmond & Son,	Meadville.
Dauphin,	I. M. McClure,	Harrisburg.
Elk,	George A. Rathburn,	Ridgeway.
Erie,	J. C. & F. F. Marshall,	Erie.
Fayette,	McDowell & Litman,	Uniontown.
Indiana,	J. N. Banks,	Indiana.
Lancaster,	Reuben H. Long,	Lancaster.
Lawrence,	D. S. Morris,	Newcastle.
Lebanon,	A. Stanley Ulrich,	Lebanon.
Luzerne,	A. A. Chase,	Scranton.
Mercer,	Griffith & Mason,	Mercer.
Montour,	Isaac X. Grier,	Darville.
Northampton,	M. Hale Jones,	Easton.
Perry,	Lewis Potter,	New Bloomfield.
Philadelphia,	Wm. Henry Rawls,	Philadelphia. 710 Walnut Street.
Pike,	John Nyce,	Milford.
Schuylkill,	J. W. Ryan,	Pottsville.
Somerset,	Samuel Gaither,	Somerset.
Sullivan,	O. Logan Grim,	Laporte.
Union,	Linn & Dill,	Lewisburg.

**SOUTH CAROLINA.**

Abbeville,	Thomas Thompson,	Abbeville C. H.
Anderson,	J. S. Murray,	Anderson C. H.
Barnwell,	John J. Maher,	Barnwell.
Barnwell,	Samuel J. Hay,	Barnwell.
Beaufort,	Colcock & Hutson,	Pocotaligo.
Charleston,	Memminger, Pinckney & Jervey,	Charleston.
Chesterfield,	W. L. T. Prince,	Cheraw.
Clarendon,	Haynsworth, Fraser & Barron,	Manning.
Colleton,	Williams & Fox,	Waterboro'.
Darlington,	McIver & Boyd,	Darlington C. H.
Edgefield,	Thomas P. Magrath,	Edgefield C. H.
Fairfield,	James H. Rion,	Winnsboro'.



**SOUTH CAROLINA—Continued.**

COUNTY.	NAME.	POST OFFICE.
Greenville,	Earle & Blythe,	Greenville.
Kershaw,	Kershaw & Kershaw.	Camden.
Lancaster,	W. A. Moore,	Lancaster.
Laurens,	S. & H. L. McGowan,	Laurens C. H.
Marlborough,	Hudson & Newton,	Bennetsville.
Orangeburg,	W. J. DeTreville,	Orangeburg.
Pickens,	Whitner Symmes,	Walhalla.
Richland,	Melton & Clark,	Columbia.
"	E. R. Arthur,	"
"	Pope & Haskell,	"
"	Talley & Barnwell,	"
Spartansburg,	J. M. Elford,	Spartansburg.
Sumpter,	Richardson & Son,	Sumpter.
Union,	Robert W. Shand,	Union.
Williamsburg,	Barron & Gilland,	Kingstree.

**TENNESSEE.**

Bedford,	H. L. & R. B. Davidson,	Shelbyville.
Benton,	W. F. Doherty,	Camden.
Bledsoe,	S. B. Northrup,	Pikeville.
Blount,	Sam. P. Rowan,	Marysville.
Bradley,	J. N. Aiken,	Charleston.
Cannon,	Burton & Wood,	Woodbury.
Carter,	W. C. Emmert,	Elizabethton.
Carrol,	James P. Wilson,	Clinton.
Coffee,	George W. Davidson,	Tullahoma.
Cheatham,	L. J. Lowe,	Ashland City.
Claiborne,	Robert F. Patterson,	Tazewell.
Cocke,	McSween & Son,	Newport.
Davidson,	F. T. Reid,	Nashville.
Decatur,	G. W. Walters,	Decaturville.
DeKalb,	Nesmith & Bro.,	Smithville.
Dickson,	R. M. Baldwin,	Charlotte.
Dyer,	A. P. Hall,	Dyersburg.
Fentress,	A. M. Garrett,	Jamestown.
Franklin,	Newman & Turney,	Winchester.
Gibson,	G. H. Hall,	Trenton.
Giles,	James & W. H. McCallum,	Pulaski.
Grundy,	James W. Bouldin,	Altamont.
Hamilton,	M. H. Clift	Chattanooga.
Hardin,	John A. Pitts,	Savannah.
Hardeman,	Hill & Hardin,	Bolivar.
Hawkins,	A. A. Kyle,	Rogersville.
Haywood,	H. B. Folk,	Brownsville.
Henderson,	J. W. G. Jones,	Lexington.
Henry,	J. N. Thomason,	Paris.
Hickman,	O. A. Nixon,	Centreville.
Humphreys,	H. M. McAdoo,	Waverly.
Jackson,	R. A. Cox,	Gainesboro'.

**TENNESSEE**—*Continued.*

COUNTY.	NAME.	POST OFFICE.
Johnson,	Thomas S. Smyth,	Taylorville.
Knox,	John Baxter,	Knoxville.
Lauderdale,	Wilkinson & Wilkinson,	Ripley.
Lincoln,	Bright & Sons,	Fayetteville.
Macon,	M. N. Alexander,	Lafayette.
Marion,	Amos L. Griffith,	Jasper,
Marshall,	James H. & Thomas F. Lewis,	Lewisburg.
Maury,	Thomas & Barnett,	Columbia.
Meigs,	V. C. Allen,	Decatur.
Montgomery,	W. A. Quarles,	Clarksville.
"	John P. Campbell,	"
Monroe,	Staley & McCrosky,	Madisonville.
McMinn,	Briant & Richmond,	Athens.
McNairy,	James F. McKinney,	Purdy.
Obion,	J. G. Smith,	Troy.
Overton,	A. F. Capps,	Livingston.
Perry,	James L. Sloan,	Linden.
Polk,	John C. Williamson,	Benton.
Putnam,	H. Denton,	Cookeville.
Roane,	Samuel L. Childress,	Kingston.
Robertson,	Wm. M. Hart,	Springfield.
Rutherford,	Ridley & Ridley,	Murfreesboro'.
Sevier,	G. W. Pickle,	Sevierville.
Shelby,	W. A. Dunlap,	Memphis,
"	H. Townsend,	Cor. Madison & 2d Sts.
Smith,	E. W. Turner,	Memphis.
"	W. H. DeWitt,	Carthage.
Sullivan,	W. D. Haynes,	"
Stewart,	J. M. Scarborough,	Blountville.
Tipton,	Peyton I. Smith,	Dover.
Warren,	John L. Thompson,	Covington.
Washington,	P. P. C. Nelson,	McMinnville.
Wayne,	R. P. & Z. M. Cypert,	Johnson Depot.
Weakley,	W. P. Caldwell,	Waynesboro'.
"	Charles M. Ewing,	Gardner.
White,	W. M. Simpson,	Dresden.
Williamson,	Hicks & Magness,	Sparta.
Wilson,	Tarver & Gollady,	Franklin.
		Lebanon.

**TEXAS.**

Anderson,	J. N. Garner,	Palestine.
Angelina,	H. G. Lane,	Homer.
Aransas,	Wm. W. Dunlap,	Rockport.
Atascosa,	W. H. Smith,	Pleasanton.
Austin,	Ben. T. & Charles A. Harris,	Bellville.
Bell,	McGinnis & Lowry,	Belton.
Bexar,	Thomas M. Paschal,	San Antonio.
Bosque,	Henry Fossett,	Meridian.

**TEXAS**—Continued.

COUNTY.	NAME.	POST OFFICE
Bowie,	B. T. Estes,	Boston.
Brazoria,	George W. Duff,	Columbia.
Brazos,	John Henderson,	Bryan.
Burk,	James H. Jones,	Henderson.
Burleson,	A. W. McIver,	Caldwell.
Caldwell,	Nix & Storey,	Lockhart.
Calhoun,	John S. Givens,	Indianola.
Cameron,	Powers & Maxan,	Brownsville.
Cooke,	Weaver & Bordeaux,	Gainesville.
Dallas,	John M. Crockett,	Dallas.
Denton,	Jackson & Downing,	Denton.
Ellis,	H. H. Sneed,	Waxahatchie.
Falls,	T. P. & B. L. Aycock,	Martin.
Fannin,	Roberts & Semple,	Bonham.
Fayette,	Moore & Ledbetter,	Lagrange.
Fort Bend,	R. J. Calder,	Richmond.
Freestone,	Theo. G. Jones,	Fairfield.
Gonzales,	Harwood & Conway,	Gonzales.
Grayson,	Woods & Cow'cs,	Sherman.
Guadalupe,	Washington E. Goodrich,	Seguin.
Harris,	Crosby & Hill,	Houston.
Harrison,	J. B. Williamson,	Marshall.
Henderson,	P. T. Tannehill,	Athens.
Hill,	Wm. B. Tarver,	Hillsboro'.
Hood,	Milwell & Saphens,	Granbury.
Houston,	D. A. Nunn,	Crockett.
Hunt,	Sam. Davis,	Greenville.
Jack,	Thomas Ball,	Jacksboro'.
Jasper,	Moulton & Doom,	Jasper.
Jefferson,	J. K. Robertson,	Beaumont.
Karnes,	Lawhon & Bookhout,	Helena.
Kaufman,	Manion & Adams,	Kaufman.
Kerr,	R. F. Crawford,	Kerrville.
Lamar,	S. B. Maxey,	Paris.
Lavaca,	H. R. McLean,	Hallettsville.
Leon,	W. D. Wood,	Centreville.
McLennan,	Flint, Chamberlin & Graham,	Waco.
Marion,	Crawford & Crawford,	Jefferson.
Milam,	C. R. Smith,	Cameron.
Montague,	W. H. Grigsby,	Montague.
Montgomery,	Jones & Peel,	Montgomery.
Navarro,	Wm. Croft,	Corsicana.
Newton,	John T. Stark,	ewton.
Nueces,	J. B. Murphy,	Corpus Christi.
Orange,	Dan H. Triplett,	Orange.
Polk,	J. M. Crosson,	Livingston.
Red River,	W. B. Wright,	Clarksville.
Robertson,	F. A. Hill,	Calvert.
Sabine,	J. M. Watson,	Hemphill.

**TEXAS**—*Continued.*

COUNTY.	NAME.	POST OFFICE.
San Augustine,	S. B. Bewley,	San Augustine.
Tarrant,	Hendricks & Smith,	Fort Worth.
Titus,	Henry Dillahunty,	Mount Pleasant,
Travis,	Chandler & Carleton,	Austin.
"	Hancock & West,	"
Trinity,	S. S. Robb,	Sumpter.
Upsher,	J. L. Camp,	Gilmer.
Uvalde,	J. M. McCormack,	Uvalde.
Victoria,	Phillips, Lackey & Stayton,	Victoria.
Williamson,	Coffee & Henderson,	Georgetown.
Wise,	Booth & Ferguson,	Decatur.
Wood,	J. J. Jarvis,	Quitman.

**UTAH.**

Great Salt Lake,	Fitch & Mann,	Salt Lake City.
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**VERMONT.**

Caledonia,	Belden & May,	St. Johnsbury.
Rutland,	J. Prout,	Rutland.

**VIRGINIA.**

Accomack,	Gunter & Gillet,	Accomack C. H.
Albemarle,	Blakey & Rierson,	Charlottesville.
Alexandria,	Ball & Mushbach,	Alexandria.
Augusta,	Effinger & Craig,	Staunton.
Buckingham,	N. F. Bocock,	Buckingham.
Campbell,	Wm. & J. W. Daniel,	Lynchburg.
Caroline,	Washington & Chandler,	Bowling Green.
Charlotte,	Thos. E. Watkins,	Charlotte C. H.
Culpepper,	A. R. Alcocke,	Culpepper.
"	Edward Cunningham,	Brandy Station.
Dinwiddie,	Mann & Stringfellow,	Petersburg.
Fairfax,	H. W. Thomas,	Fairfax C. H.
Fluvanna,	Wm. B. Pettit,	Palmyra.
Frederick,	T. T. Fauntleroy, Jr.,	Winchester.
Gloucester,	J. T. & J. H. Seawell,	Gloucester.
Greene,	R. S. Thomas,	Stanardsville.
Greenville,	W. S. Goodwyn,	Hicksford.
Hanover,	W. R. Winn,	Ashland.
Henrico,	George L. Christian,	Richmond.
"	Wm. J. Clopton,	"
James City,	R. H. Armistead,	Williamsburg.
King William,	B. B. Douglas,	Ayletts.
Lancaster,	B. H. Robinson,	Lancaster.
Lee,	David Miller,	Jonesville.
Loudon,	John M. Orr,	Leesburg.
Matthews,	T. J. Christian,	Matthews C. H.
Mecklenburg,	Chambers, Goode & Baskerville,	Boydton.
Middlesex,	Robert L. Montague,	Saluda.

**VIRGINIA—Continued.**

COUNTY.	NAME.	Post Office.
Montgomery,	John J. Wade,	Christiansburg.
Nansemond,	John R. Kilby,	Suffolk.
Nelson,	Thomas P. Fitzpatrick,	Arrington.
New Kent,	John P. Pierce,	New Kent C. H.
Norfolk,	Hinton, Goode & Chaplain,	Norfolk.
Nottoway,	Wm. R. Bland,	Wellville.
Page,	Richard S. Parks,	Luray.
Pittsylvania,	Reed & Bouldin,	Danville.
Prince Edward,	Berkeley & Berkeley,	Farmville.
Pulaski,	Lewis A. Buckingham,	Snowville.
Roanoke,	Strouse & Marshall,	Salem.
Rockbridge,	D. E. & J. H. Moore,	Lexington.
Rockingham,	George G. Grattan,	Harrisonburg.
Scott,	E. F. Tiller,	Estillville.
Smyth,	Gilmore & Derrick,	Marion.
Southampton,	J. H. & J. B. Prince,	Jerusalem.
Spottsylvania,	Marye & Fitzhugh,	Fredericksburg.
Surrey,	George T. Clarke,	Bacon's Castle.
Washington,	Frank A. Humes,	Abingdon.
Wythe,	Terry & Pierce,	Wytheville.

**WASHINGTON TERRITORY.**

Jefferson,	B. F. Dennison,	Port Townsend.
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**WEST VIRGINIA.**

Berkeley,	Blackburn & Lamon,	Martinsburg.
Cabell,	B. F. Curry,	Hamlin.
Fayette,	Theophilus Gaines,	Fayette C. H.
Greenbrier,	Mathews & Mathews,	Lewisburg.
Hardy,	Jos. Sprigg,	Moorefield.
Harrison,	Gideon D. Camden,	Clarksburg.
Jackson,	Henry C. Flesher,	Jackson C. H.
Jefferson,	Jo. Mayse,	Charleston.
Kanawha,	McWhorter & Freer,	Charleston.
Mason,	W. H. Tomlinson,	Point Pleasant.
Mineral,	George A. Tucker,	Piedmont.
Monongalia,	Willey & Son,	Morgantown.
Morgan,	J. Rufus Smith,	Berke'ey Springs.
Ohio,	W. V. Hoge,	Wheeling.
Pocahontas,	D. A. Stofer,	Huntersville.
Preston,	G. Cresap,	Kingwood.
Raleigh,	Martin H. Holt,	Raleigh C. H.
Randolph,	David Goff,	Beverly.
Roane,	J. G. Schilling,	Spencer.
Upsher,	W. G. L. Totten,	Buckhannon.

**W I S C O N S I N .**

<b>COUNTY.</b>	<b>NAME.</b>	<b>POST OFFICE.</b>
Adams,	O. B. Lapham,	Friendship.
Brown,	Hastings & Greene,	Green Bay.
Clark,	Robert J. McBride,	Neillsville.
Dane,	Vilas & Bryant,	Madison.
Door,	D. A. Reed,	Sturgeon Bay.
Eau Claire,	Wm. Pitt Bartlett,	Eau Claire.
Grant,	Bushnell & Clark,	Lancaster.
Green,	Dunwiddie & Bartlett,	Monroe.
Green Lake,	John C. Truesdell,	Princeton.
Iowa,	George L. Frost,	Dodgeville.
Juneau,	R. A. Wilkinson,	Mauston.
Kenosha,	J. J. Pettit,	Kenosha.
LaFayette,	George A. Marshall,	Darlington.
Marquette,	Wm. H. Peters,	Montello.
Portage,	James O. Raymond,	Plover.
Racine,	George B. Judd,	Racine.
Richland,	Eastland & Eastland,	Richland Centre.
St. Croix,	J. S. Moffatt,	Hudson.
Walworth,	H. F. Smith,	Elkhorn.
Washington,	Frisby & Weil,	West Bend.

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